

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

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JUN 25 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Amendment of Section 73.622(b))	
Table of Allotments,)	MM Docket No. 02-92
Digital Television Broadcast Stations)	RM-10363
(Albany, New York))	
)	

COMMENTS OF UNITED COMMUNICATIONS CORPORATION

United Communications Corporation ("United"), licensee of television broadcast station WWNY-TV, Carthage, New York, by its counsel, hereby opposes the request, as amended (the "Petition") filed by Clear Channel Broadcasting Licenses, Inc. ("Clear Channel") to substitute DTV Channel 7 for the current DTV assignment of Channel 4 to station WXXA-TV at Albany, New York.

Background

This change was originally proposed in a *Petition for Rulemaking* submitted on October 22, 1999 (the "1999 Petition"). By letter dated August 28, 2001, the Television Branch dismissed the Petition due to anticipated interference to WWNY-TV. Clear Channel submitted a *Petition for Reconsideration* dated September 27, 2001. Along with that filing, Clear Channel amended the 1999 Petition to reduce the proposed operating power of WXXA-TV, thereby purporting to limit objectionable interference to WWNY-TV to just under the two percent threshold for consideration under Section 73.623(c)(2) of the Rules

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(the “2001 Amendment”). The instant *Notice of Proposed Rulemaking*, DA 02-979 (May 3, 2002) (“*NPRM*”) solicits comment on the amended proposal.

Comments

Clear Channel’s proposal should be rejected. It holds the potential for greater harm than possible benefit to the public interest, for the following reasons: (1) the FCC has to reject Clear Channel’s proposed change in digital allotments; (2) Clear Channel has failed to provide adequate support for its proposal; and (3) the *2001 Amendment* failed to cure all objectionable interference. Each of these points is explained below.

I. The FCC Retains the Discretion to Act in the Public Interest.

The Commission should not fall into the assumption that it has surrendered all discretion pursuant to a numerical threshold, when that device actually provides a first step in a determination of grantability. The two percent threshold referenced in Section 73.623(c)(2) of the FCC’s Rules is not a *per se* determination that the Commission will allow a change predicted to cause less than that amount of interference to the audience of another station. Rather, the Rule simply states that, *in order to be considered at all*, “requests . . . must demonstrate that the requested change would not result in more than an additional 2 percent the population served by another station being subject to interference . . .” 47 C.F.R. §73.623(c)(2). In other words, the numerical value in the Rule serves a gatekeeper function, but it does not foreclose further scrutiny of proposals that survive this initial test.

Likewise, the Multiple Ownership Rules provide a threshold test that serves a useful purpose. The numerical limits sort out for dismissal any number of proposed combinations of stations that are deemed, *per se*, contrary to the public interest. However, those Rules are merely the first hurdle for a proposed merger, rather than the only measure of the public interest on which the Commission may rely. The FCC retains the discretion to “flag” for further scrutiny certain proposed mergers where the resulting ownership in a market, while complying with the strict numerical limits, may still fail to serve the public interest. *See Public Notice*, Rep. No. 24303 (Aug. 12, 1998).

Similarly, the two percent test for changes in digital allotments is merely an initial hurdle.¹ If the party advocating an amendment to the Table of Allotments survives this test, its proposal is simply entitled to further consideration. Thus, even if Clear Channel has met this test and has therefore earned the right to receive additional scrutiny, that fact does not amount to a *per se* determination that the proposed operation is consistent with the public interest. The FCC’s foremost duty is to protect against objectionable interference, especially where it is unnecessary. Here, it is essential that the FCC not hide from the duty merely because Clear Channel claims that predicted interference levels satisfy the very *least* that is required of any proposed change in digital allotments.

¹ Caution in granting applications that facially propose little interference is advisable, given that the full ramifications of DTV operation are not yet known. As has been reported recently in the trade press, the interference criteria adopted by the Commission are proving in actual practice to be too lenient in some settings. *See Broadcasting & Cable*, “DTV Interference Issues Loom” (June 24, 2002).

II. Clear Channel Failed to Justify Its Proposed Amendment.

The switch to DTV would expand the service area of WXXA-TV. In fact, the entire Grade B signal contour for the station's current NTSC operation on Channel 23 is completely contained within the authorized City Grade contour of WXXA-DT.

Clear Channel's proposed amendment to the Table of Allotments would yield the same effect. One is therefore left to wonder what aspect of the public interest compels rejection of the DTV channel originally allotted to WXXA-TV.

Clear Channel submitted its *1999 Petition* with the ostensible purpose of eliminating "the potential for interference by WXXA-DT to videocassette recorders in its service area which typically operate on Channels 3 or 4." *1999 Petition* at ¶ 2.

Unfortunately for Clear Channel, the Commission has previously considered this argument. Whenever the FCC has considered changes in the DTV Table of Allotments based on fears of interference relating to videocassette recorders, that rationale has been uniformly rejected.

The Association for Maximum Service Television (MSTV) suggested that the Commission should not allot both Channels 3 and 4 to the same community. However, in response to the concern expressed by MSTV, the Commission stated:

[W]e are aware of the potential interference concerns mentioned by MSTV with regard to use of these channels in the same community. In general, we believe the output signal levels of cable terminal devices and VCRs can be expected to be significantly higher than the off-air levels of an ATV signal on the frequency on which this equipment would operate. Moreover, the amplified output signal of cable terminals and VCRs would be coupled by cable

directly to the input terminal of a TV receiver's tuner circuit. The interfering ATV signal, on the other hand, would be present only through direct pickup within the TV receiver itself, and therefore would be at significantly lower level of power. An off-air ATV signal is therefore not likely to interfere with the operation of a cable terminal or VCR. Conversely, if the connection between the output of a cable terminal or VCR and a TV receiver is properly shielded, the output signal will not interfere with reception of off-air signals through the VCR, suitably equipped cable terminal or other device for switching program sources. Thus, *we believe that Channels 3 and 4 generally can be used for NTSC and ATV operations in the same area without conflicting with the operation of cable terminal devices and VCRs.* Nonetheless, if it is decided to use the VHF frequencies for ATV, we propose to avoid the allotment of both Channels 3 and 4 within the same community wherever possible.

Advanced Television Systems, Second Further Notice, 7 FCC Rcd 5376, ¶ 44 (1992) (emphasis added).

Thereafter, in its *Sixth Further Notice*, the Commission recognized “potential for interference to cable terminal devices and VCRs if [both] channels 3 and 4 were used in the same area.” *Sixth Further Notice*, 11 FCC Rcd 10968, ¶¶ 73 -74 (1996). In response to this concern, the Commission proposed to avoid use of both channels 3 and 4 for DTV service in the same community. *Id.*

Following that determination, when the Commission released its DTV Table of Allotments in 1997, it refrained from allotting both Channels 3 and 4 to stations in the same market. *Advanced Television Systems*, 12 FCC Rcd 14588, ¶¶ 148-151.

After the publication of the DTV Table of Allotments, CBS, Inc. (licensee of WBBM-TV, Chicago) protested that the allotment of DTV Channel 3 to WBBM-TV would be compromised by operation of an NTSC station on Channel 4 at Milwaukee. CBS argued

that in the area of signal overlap between the stations, viewers would experience interference with the operation of video cassette recorders. The Commission rejected CBS's argument, noting that "CBS's concerns about operational difficulties when both channels 3 and 4 are in use are unfounded. We find that the separation between these stations is sufficient to avoid any operational difficulties with set-top devices such as VCRs." *Advanced Television Systems*, 13 FCC Rcd 7418, ¶¶ 470-471 (1998).

Likewise, Clear Channel has not shown that there will be any genuine detriment to the public interest from leaving WXXA-TV with its current Channel 4 allotment. No evidence has been presented to demonstrate that, contrary to the above determination, there really would be a significant problem of interference to videocassette recorders from a digital operation of WXXA-TV on Channel 4. Rather, without any proof of potential interference to videocassette recorders, Clear Channel has asked the Commission for a gratuitous change in channel assignment for WXXA-DT.

The FCC has not allotted Channel 3 to any station in the Albany area. Thus, there is no potential for interference to VCRs that use Channel 3 as their output channel. Interference to recording devices that are using Channel 4 as their output channel presents only a theoretical possibility. The output signals of VCRs can be easily switched between Channel 3 and Channel 4. Because a VCR output signal is amplified, a VCR has a direct cable connection to its associated television receiver. Because a VCR output channel can be selected by the user, VCR users who do encounter a problem with Channel 4 will simply

change to Channel 3. Accordingly, the Commission should not accept such concerns as a basis for granting the WXXA-TV petition. Of greater concern is that a grant of the *1999 Petition* would set a precedent effectively limiting the DTV Table of Allotments to channels other than 3 or 4. Every station assigned those channels will have what will amount to a pass to increase congestion elsewhere.

The FCC has properly rejected the "VCR rationale." Clear Channel has no other reason for switching to Channel 7, and has not supported its theory in any event. Therefore, the notion that there is any need for the proposed change is, in light of the established precedent, without foundation.

III. The 2001 Amendment Failed to Cure All Objectionable Interference.

When considering the allocation of broadcast frequencies, the first priority of the Commission must always be fostering service to all parts of the country (consistent with minimizing interference where that can be done). 47 U.S.C. §307(b). Clear Channel's proposed amendment of the Table of Allotments conflicts with this top priority because it would harm television reception service in rural areas of upstate New York, many of which have few other services.

As the Commission's computer analysis will confirm, the proposed operation of WXXA-DT on Channel 7 will interfere with service currently provided by WWNY-TV in a swathe including southern Lewis County and northern Oneida County, New York, with scattered locations suffering interference extending northeasterly into upper Herkimer

County and Hamilton County near Long Lake. Many of the communities of this region rely on WWNY-TV as the station most attuned to local concerns, and in some cases the only available off-air television service. If the Commission accepts the amendment proposed by Clear Channel, interference to WWNY-TV from WXXA-DT will significantly degrade or eliminate television reception that North County residents have relied on for almost five decades. Such a change would contradict the first priority of the FCC, all in order to confer a dubious benefit on a station serving a populous metropolitan area.

Carthage, the community of license of WWNY-TV, has only four percent of the population of Albany. Watertown, the largest community served by WWNY-TV, is dwarfed by the population of the crowded Albany-Troy-Schenectady area. Thus, WWNY-TV focusses on the needs and interests of rural New Yorkers far more than stations from larger markets such as Albany even though the large-market stations may place signal contours over such regions.

In particular, WWNY-TV offers political news coverage that relates directly to residents in the communities that would receive interference from the WXXA-TV plan. The political interests of the affected communities are often identical to those of residents of Carthage. For example, the areas of interference are mostly within the U.S. Congressional District of John McHugh, a district that is almost co-extensive with the service area of WWNY-TV except for its northeast and southeast extremes. *See Exhibit 1.* Likewise, the area represented by New York State Senator Raymond Meier reflects the common interests

shared by residents where Clear Channel's proposal would cause interference and by residents in the heart of the WWNY-TV service area. *See* Exhibit 2. When terrorist attacks have shown the importance of local political news, Clear Channel's proposed change threatens to deprive numerous New Yorkers of a vital source of political news.

In addition, the harm caused by WXXA-DT operating on Channel 7 will include the loss of other valuable service provided by WWNY-TV. This station is the leading local news service in the North County, with audience shares for local news far in excess of those achieved by the average television station. It is one thing to dismiss a two percent loss as "de minimis" when those affected have many other viewing options. It is quite another to contemplate such a loss when those affected rely heavily on the unique sacrifice of a station they would lose.

Thus, Clear Channel's proposed change in channel allocation is contrary both to the Commission's Section 307(b) priorities and to the right of the public to receive WWNY-TV without objectionable interference.

Conclusion

In view of the foregoing, United has shown that the proposed change would cause objectionable interference undermining the FCC's highest priorities. Clear Channel, by contrast, has supported its proposal by nothing more than a mere allusion to an alleged threat purportedly posed by the use of Channel 4 by videocassette recorders. This falls far short

of justifying a substitution of DTV channel 7 for DTV channel 4 at Albany. Clear Channel's proposed amendment to the Table of Allotments would cause more injury than benefit to the public interest. Accordingly, the Commission should reject the proposed change and leave the Table of Allotments with an allotment of DTV Channel 4 to Albany.²

Respectfully submitted,

**UNITED COMMUNICATIONS
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² United has no objection to the original proposal of Vermont ETV, Inc. for allotments of Channel 7 to Rutland, Vermont.

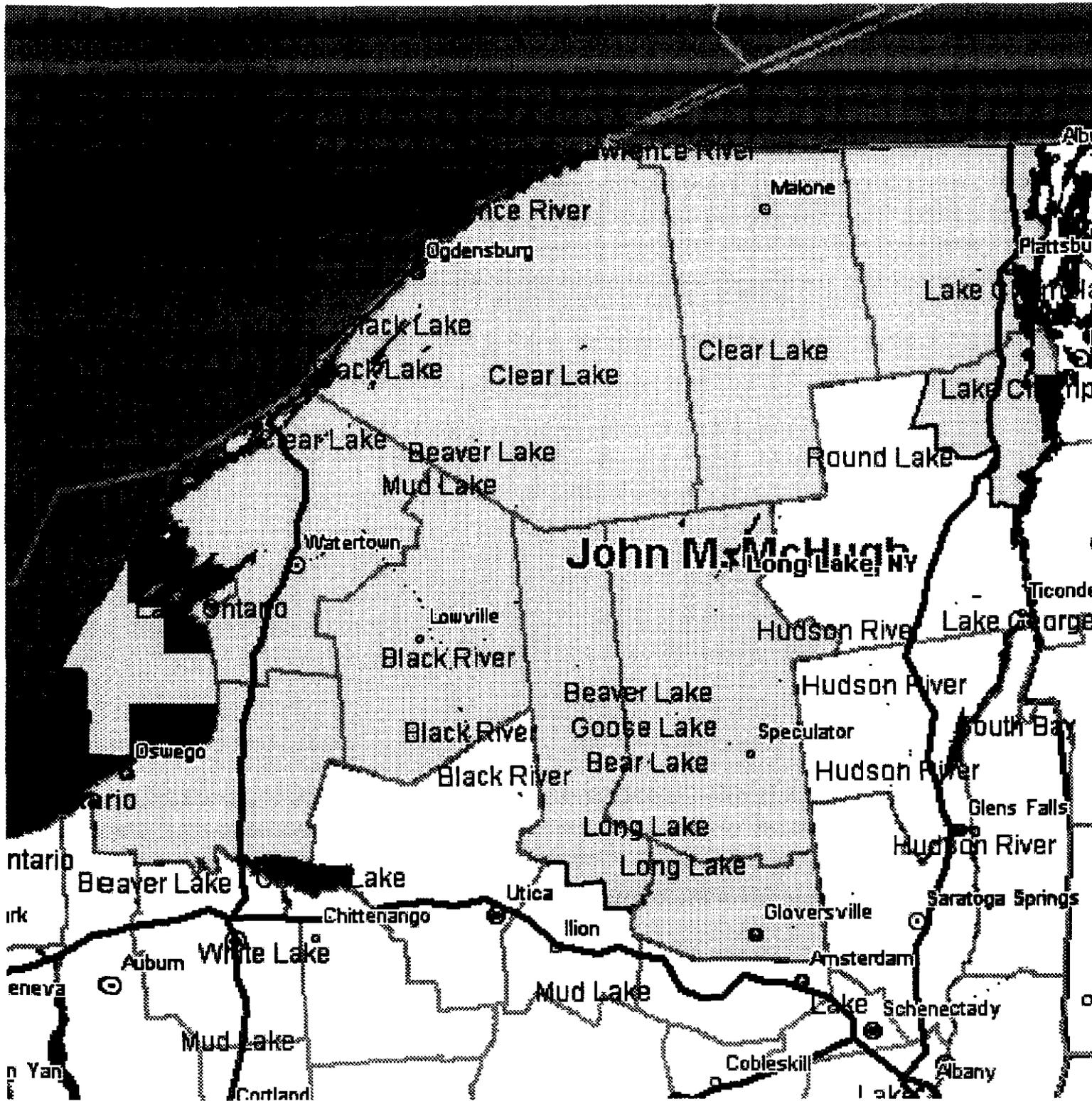


EXHIBIT I

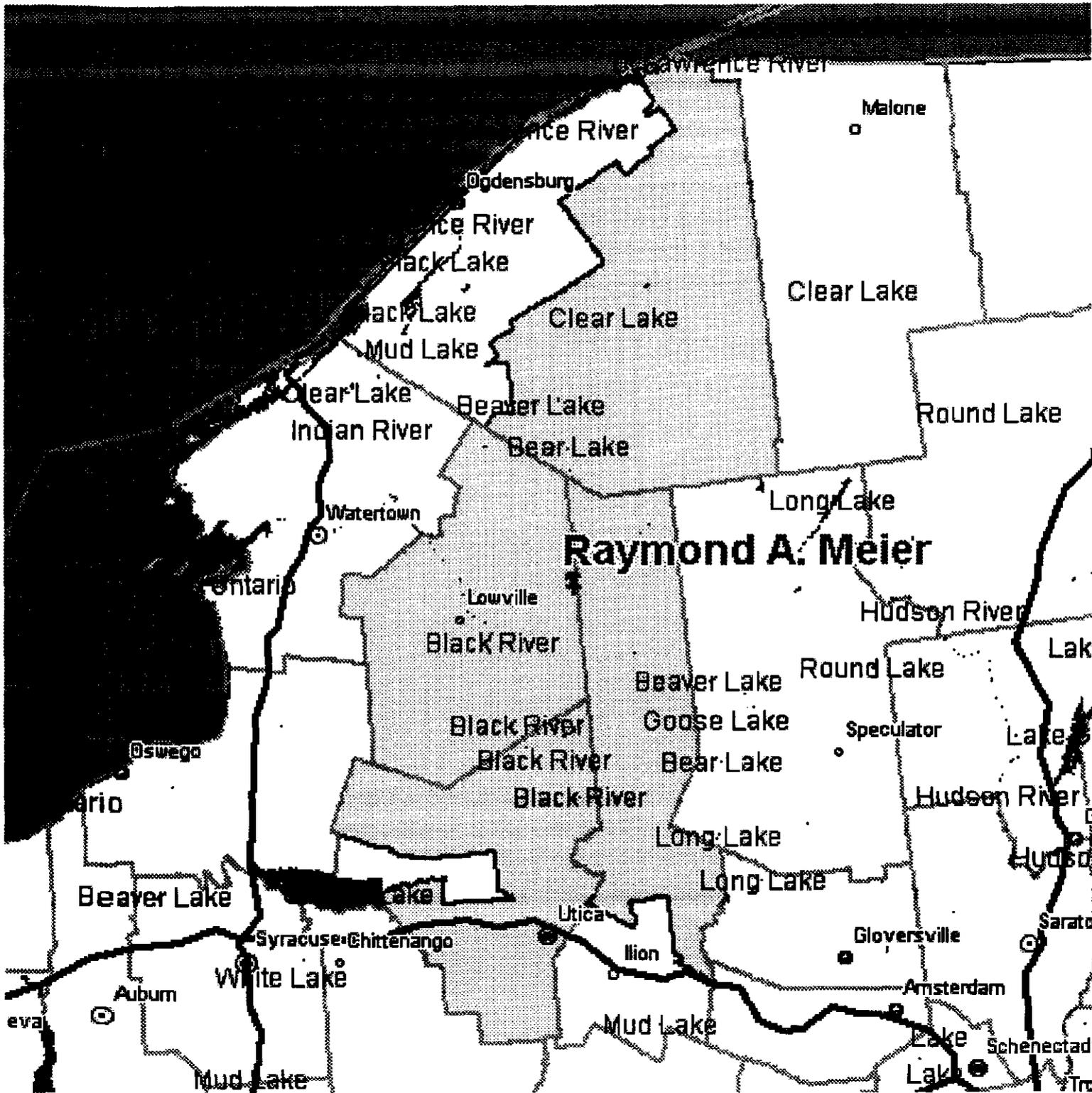


EXHIBIT II

CERTIFICATE OF SERVICE

I, Stuart W. Nolan, Jr., hereby certify that on this date I caused the foregoing "Comments" to be served by hand-delivery on the following:

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Stuart W. Nolan, Jr.

Dated: June 25, 2002