

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

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In the Matter of)
)
Amendment of Section 73.202(b),) MB Docket No. 04-20
Table of Allotments,) RM-10842
FM Broadcast Stations)
(Cambridge and St. Michaels, Maryland))

To: Assistant Chief, Audio Division
Media Bureau

MOTION FOR LEAVE
TO FILE SUPPLEMENTAL COMMENTS

MTS Broadcasting, L.C. ("MTS"), licensee of radio station WCEM-FM, Cambridge, Maryland, acting pursuant to Section 1.41 of the Commission's rules, 47 C.F.R. §1.41, hereby moves for leave to file the attached Supplemental Comments in response to the Reply Comments filed on April 20, 2004 by CWA Broadcasting, Inc. ("CWA") in the above-captioned proceeding. In support of that motion, the following is stated:

1. In its Reply Comments, CWA claims, *inter alia*, that Newark, Maryland does not constitute a community for allotment purposes and that the counterproposal advanced in MTS's Comments of April 5, 2004 should be rejected. CWA also requests the dismissal of the counterproposal filed by Route 12 Community Broadcasters ("Route 12") for the allotment of Channel 232A at Stockton, Maryland because Route 12's counterproposal does not protect WINX-FM's licensed facility at Cambridge, Maryland. Reply Comments at 6.

2. MTS has not had an opportunity to respond to the foregoing arguments advanced by CWA, especially since some of CWA's allegations extend beyond the specific proposal set forth in the *Notice of Proposed Rule Making*, 19 FCC Rcd 2592 (Aud. Div. 2004). The attached

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Supplemental Comments provide that response and will help ensure that the record of the instant proceeding is a complete one.

3. A grant of the instant motion and acceptance of the Supplemental Comments will not materially delay the resolution of the proceeding or otherwise prejudice any public or private interest. This is especially so since, as explained in CWA's Reply Comments, both the MTS counterproposal and the Route 12 counterproposal are mutually exclusive with a pending rulemaking petition seeking the allotment of Channel 233A at Chincoteague, Maryland. *See* Reply Comments at 8. As a result, both the Stockton and Newark counterproposals – as well as CWA's proposal to substitute Channel 232B1 for Channel 232A at St. Michaels and reallocate Channel 232B1 from St. Michaels to Cambridge – must be consolidated in a further proceeding with the Chincoteague allotment proposal.

WHEREFORE, in view of the foregoing, it is respectfully requested that the instant motion be granted and that the attached Supplemental Comments be accepted for filing.

Respectfully submitted,

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By: 
Lewis J. Paper
Andrew S. Kersting

**Before the
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FM Broadcast Stations)	
(Cambridge and St. Michaels, Maryland))	
 To: Assistant Chief, Audio Division		
Media Bureau		

SUPPLEMENTAL COMMENTS

MTS Broadcasting, L.C. (“MTS”), licensee of radio station WCEM-FM, Cambridge, Maryland, hereby submits these Supplemental Comments in response to the Reply Comments filed by CWA Broadcasting, Inc. (“CWA”) on April 24, 2004 in the above-captioned proceeding.

I. Newark is a Community for Allotment Purposes.

CWA claims that Newark, Maryland is not a community for allotment purposes because, *inter alia*, the businesses and community organizations identified in MTS’s Comments allegedly fail to provide the social, economic and cultural elements necessary to comprise a community. *See, e.g.*, Reply Comments at 2. None of CWA’s claims has any merit.

CWA begins by challenging the status of Newark’s post office because there is “no indication that this post office box independently serves or otherwise identifies with Newark . . .” *Id.* at 7. That challenge is easily refuted. The Newark post office is located close to the center of Newark at 8420 Newark Road. *See Exhibit A* annexed hereto. According to Kelly Sadler, a postal employee, the Newark post office serves only the Newark community. As indicated in

Exhibit B annexed hereto, the zip code 21841 is specifically assigned to the community of Newark. It is not associated with or assigned to any other community. *See* MTS Comments, Exhibit B at 2. Therefore, CWA is simply wrong in stating that the Newark post office does not support a separate identity for Newark. *See* Reply Comments at 7.

CWA also claims that the Newark Fire Department “serves primarily a rural, 50 square mile area.” CWA alleges that “this hardly serves as evidence of Newark’s status as a self-contained, independent community.” *Id.*

These latter claims are not supported by the facts. The Newark Fire Department is located at 8334 Newark Road, which also is located near the center of Newark. *See* Exhibit A annexed hereto. The ambulance lieutenant of the Newark Fire Department advised MTS representatives that the department has 60 volunteers on its roster and that most of those volunteers reside in Newark. *Id.* According to that same lieutenant, the Fire Department’s primary service area is within a 10-to-15 mile radius of the fire station. *Id.* The Fire Department responds to emergencies in other communities only on rare occasions and only when it is specifically requested to do so. *See* Exhibits A and C annexed hereto. Thus, CWA is in error in saying that the Newark Fire Department does not focus its service in the community of Newark.

CWA is equally wrong in claiming that the Newark Station does not contribute to Newark’s status as a community because it is allegedly only a gas station. *See* Reply Comments at 7. According to Shirley Evans, the Pastor at two of Newark’s three churches, the Newark Station is far more than a gas station; it is also a convenience store and a “grill” for the farming community which includes Newark. *See* Exhibit D annexed hereto. Pastor Evans states that farmers often come into Newark Station for coffee in the morning, and that other Newark residents visit Newark Station for milk, bread, eggs, and an assortment of other food supplies.

Pastor Evans herself has placed orders for food from Newark Station on more than one occasion for informal gatherings at the Bowen and Trinity Churches in Newark. *Id.*

The foregoing facts reflect the dynamics of a community which, despite CWA's allegations to the contrary, includes the kind businesses and organizations that are part of an integrated community.¹

II. CWA's Precedent is Distinguishable.

As a Census Designated Place ("CDP"), Newark is entitled to presumption that it is a community for allotment purposes. *See Grants & Peralta, New Mexico*, 14 FCC Rcd 21446, 21449 (M.M. Bur. 1999) ("*Peralta*"). In an effort to rebut that presumption, CWA cites several prior Commission decisions. However, all of those decisions can be distinguished from the facts surrounding Newark.

In *Peralta*, the Allocations Branch held that Peralta was not a community for allotment purposes. 14 FCC Rcd at 21449. Like Newark, Peralta was a CDP but, unlike Newark, Peralta did not have its own post office. Peralta's mail was delivered to a post office in the neighboring community of Bosque Farms. *Id.* The Allocations Branch also expressed concern that there was "no separate listing for Peralta residents or businesses in the telephone book." *Id.* In contrast, as reflected in Exhibit H annexed hereto, Newark residents are separately identified in the phone book for Somerset-Worcester Counties.

The facts in *Stock Island, Florida*, 8 FCC Rcd 343 (M.M. Bur.1993), and *East Hemet, Indio, Rancho*, 4 FCC Rcd 7895 (M.M. Bur. 1989), also are distinguishable. *See Reply Comments* at 3. Although Stock Island was a CDP, it had only a fire department, a

¹ Both the Newark post office and the Newark Fire Department are located near the center of town. *See Exhibit A* annexed hereto. The Peninsula Bank, which is located at 8305 Langmaid Road, and Mary Lou's Assisted Care facility, which is located at 8431 Newark Road, also are located near the center of Newark. *See Exhibits F and G* annexed hereto.

businessman's association, and a neighborhood improvement program. 8 FCC Rcd at 843. It thus lacked the churches, business establishments, and the post office that are found in Newark. The Allocations Branch also observed that there was no persuasive evidence that "East Hemet," California – which similarly lacked the local businesses and organizations (including a post office) found in Newark – was a community separate from Hemet, California. The Branch therefore deleted an allotment from East Hemet.²

CWA's citation to *Danville and Nonesuch, Kentucky*, 18 FCC Rcd 9304 (Aud. Div. 2003), is also inapposite. See Reply Comments at 7-8. Unlike Newark, Nonesuch was not a CDP and did not have any civic organizations, businesses, or churches located in the community. Indeed, there were signs posting a 55 mile-per-hour speed limit near Nonesuch indicating the absence of any businesses or homes in the area. And, unlike Newark, Nonesuch did not have a population number associated with it, a zip code, or a post office. The Audio Division therefore concluded that Nonesuch was not a community for allotment purposes. 18 FCC Rcd at 9306.

Newark stands in sharp contrast to Nonesuch. Newark does not have its own local government, but it is served by a local post office which serves Newark and no other

² CWA also cited *Rockport, Gregory, Alice and Armstrong, Texas*, 4 FCC Rcd 8075 (M.M. Bur. 1989), and *Broadview, Montana*, 14 FCC Rcd 14101 (M.M. Bur. 1999). See Reply Comments at 7. Those cases also do not support CWA's position that Newark should not be considered a community for allotment purposes. In *Rockport*, the town of Armstrong was not (unlike Newark) a CDP, and the proponent failed to demonstrate that the community had any businesses, social organizations or governmental units that identified themselves with the area. The Allocations Branch therefore held that Armstrong was not a community for allotment purposes.

In *Broadview*, although the proponent claimed that a variety of governmental and community organizations existed in that community, the Allocations Branch found that the proponent failed to provide evidence that they were specifically associated with the designated community by showing that they had a Broadview address or that they were intended to serve Broadview as opposed to an expanded rural area. As a result, the Branch found that Broadview was not a community for allotment purposes. 14 FCC Rcd at 14101.

community.³ Newark also hosts (1) the Newark Station, which functions as a gas station, a convenience store and a “grill;” (2) the Worcester County Solid Waste Facility,⁴ and (3) the Queponco Railway Station, Inc.⁵

Unlike Nonesuch, Newark benefits from the presence of several civic organizations and a school. They include Mary Lou’s Assisted Care facility, Shore Up Community Action, and the Worcester Career and Tech Center located at 6268 Worcester Highway in Newark (which is approximately five miles from the center of Newark). See Exhibit I annexed hereto.

Another contrast with Nonesuch are Newark’s three churches, which are a focus of community activities: Bowen United Methodist Church (“Bowen Church”), Trinity United Methodist Church (“Trinity Church”), and the Williams African Methodist Episcopal Church (“AME Church”).⁶ The Bowen and Trinity Churches are located in the same building at 8426 Newark Road in Newark. See Exhibit D annexed hereto. The AME Church is located just

³ With the general exception of incorporated cities, local government in the State of Maryland consists of the county government rather than a municipal government. For example, Bethesda, Maryland – which plainly qualifies as a community for allotment purposes – has no mayor or other local government but is instead subject to governance by Montgomery County.

⁴ CWA attempts to discredit MTS’s reference to the Worcester County Solid Waste facility by claiming that a “garbage dump” cannot be a “an indicator of community status.” Reply Comments at 7. However, in *Port St. Joe and Eastpoint, Florida*, 18 FCC Rcd 11233 (Aud. Div. 2003), the Audio Division found Eastpoint to be a community for allotment purposes and observed that Eastpoint was home to several Franklin County facilities, including its “Solid Waste Department.” 18 FCC Rcd at 11234. For the same reason, the location of the Worcester County Solid Waste facility in Newark (which is part of Worcester County) provides indicia of community.

⁵ The Queponco Railway Station is located at 8378 Patey Woods Road in Newark, approximately four miles from the center of town. See Exhibit H hereto. The railway station is no longer used, but is open to the public for tours on the 1st and 3rd Saturday from 1:00 – 4:00 p.m. from May through October and by appointment during the remainder of the year. See MTS Comments, Exhibit B at 10.

⁶ Preliminary information provided to MTS indicated that there were only two churches in Newark. See Comments at 7. As explained below, that conclusion overlooked the fact that two churches (Bowen Church and Trinity Church) operate out of the same physical structure. See Exhibit D annexed hereto.

outside Newark, but with a Newark address at 7846 Williams Church Road, Newark. *See Exhibit E* annexed hereto.

Shirley Evans is the Pastor of both the Bowen and Trinity Churches. According to Pastor Evans, the Bowen Church has approximately 100 members and the Trinity Church has approximately 50 members. Pastor Evans believes that approximately 50% of the people who attend weekly services at the Bowen and Trinity Churches reside in Newark.

The Bowen and Trinity Churches also have a joint vacation bible school which meets for one week during the summer. The bible school is for children between the ages of pre-school through middle school. Approximately 35 children attend the vacation bible school. Approximately 75% of those children are from Newark.

Those churches have at least two separate women's groups – the United Methodist Women's Group and the Women's Circle Group. The United Methodist Women's Group meets once a month in the home of one of the Trinity Church's members. The Women's Circle Group is comprised of a small group of women in the Bowen Church and meets once a month in the Church. *See Exhibit D* annexed hereto.

In sum, the Newark churches and local organizations demonstrate that there is a sense of unity and involvement in local community activities and concerns by Newark residents that was absent in Nonesuch and that is sufficient to demonstrate Newark's status as a community for allotment purposes. *Compare Danville and Nonesuch*, 18 FCC Rcd at 9306.

III. WINX-FM's Licensed Facility is Not Entitled to Protection.

CWA claims that the Stockton counterproposal filed by Route 12 should be dismissed because it does not protect WINX-FM's licensed facility. Reply Comments at 6. CWA's position is not supported by citation to any rule or precedent.

The absence of any supporting authority in CWA's Reply Comments is not surprising. The Commission's decision reallocating Channel 232A from Cambridge to St. Michaels has been final for over seven years. *Cambridge and St. Michaels, Maryland*, 12 FCC Rcd 3504 (1997). It is well established that the grant of a rulemaking petition to reallocate an FM channel and change a station's community of license amends the FM Table of Allotments and modifies that station's license to operate on the new channel and/or class. Although a licensee may continue to operate from its previously-authorized facilities before the new construction permit expires, a licensee has no right to retain the previously-licensed facilities. Quite the contrary. After the table of allotments is amended (as was the case with Channel 232A at St. Michaels), the licensee can operate its licensed facilities only on the basis of an implied Special Temporary Authorization ("STA"). *See Dos Palos, Chualar, and Big Sur, California*, 19 FCC Rcd 1826, 1831 (Aud. Div. 2004). Therefore, neither Route 12 nor any other party is required to protect WINX-FM's licensed facility merely because CWA has continued to operate the station from that location.

In apparent recognition of the temporary status of its licensed facilities, the Engineering Statement attached to CWA's Reply Comments ("Engineering Statement") uses an alternative methodology (Longley-Rice) designed to show that WINX-FM could provide a 70 dBu signal to St. Michaels from the station's presently licensed transmitter site if it were to continue operations as a Class A facility. *Id.* at 2. The Engineering Statement says that use of that alternative Longley-Rice methodology is warranted because "of the extremely flat terrain between the transmitter site and the community of St. Michaels" which satisfies the requirement in Commission rules that the terrain profile "'departs widely' from the average" terrain. *See* Reply Comments, Engineering Statement at 2.

There is of course a threshold question whether the Commission would accept in an allotment proceeding the alternative methodology that the Commission accepts in an application proceeding.⁷ Compare Letter dated August 8, 2002 from Edward P. De La Hunt, Associate Chief, Audio Division, Office of Broadcast License Policy, Media Bureau, to Mark N. Lipp, *In re KMAJ-FM, Topeka, Kansas (File No. BPH-2000316ACF)*. Even assuming *arguendo* that the Commission were to accept CWA's proposed alternative terrain analysis in an allotment proceeding, WINX-FM's city-grade coverage of St. Michaels has no relevance in the instant proceeding. The *Notice of Proposed Rule Making*, 19 FCC Rcd 2592 (Aud. Div. 2004) ("*NPRM*"), proposed to substitute Channel 232B1 for Channel 232A at St. Michaels and reallocate Channel 232B1 to Cambridge. The ability of WINX-FM's licensed facility to provide a city-grade signal to St. Michaels provides no basis for the disposition of that proposal.

CWA is no doubt concerned that adoption of Route 12's counterproposal (and retention of Channel 232A at St. Michaels) would force CWA to secure a new transmitter site because its licensed transmitter site would be short-spaced to the allotment of Channel 232A at Stockton. As CWA's Engineering Statement explains, "There is no location from which a Channel 232 Class A facility may cover the community of Stockton, Maryland and be properly spaced to the currently licensed WINX-FM transmitter site." Engineering Statement at 3. That observation too is irrelevant in the instant proceeding. If the Stockton proposal is granted, CWA will have to secure a new transmitter site and fulfill its original promise to relocate WINX-FM to St. Michaels.

⁷ See *Caldwell, College Station and Gause, Texas*, 15 FCC Rcd 3322, 3326 (2000) (use of an alternate propagation methodology is unacceptable where the variance from average terrain was only 24 meters because the terrain was not "so unusual that a methodology such as Tech Note 101 is appropriate"), *recon. denied*, 15 FCC Rcd 20641 (2000). Cf. *Woodstock and Broadway, Virginia*, 3 FCC Rcd 6398 (1988) (use of alternative terrain methodology accepted to show city-grade coverage).

Conclusion

WHEREFORE, in view of the foregoing and the entire record herein, it is respectfully requested that (1) Newark, Maryland be deemed to be a community for allotment purposes, (2) the Bureau adopt the counterproposal set forth in MTS's comments to allot Channel 233A to Newark, Maryland, and (3) the proposal set forth in the *NPRM* be denied.

Respectfully submitted,

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MTS BROADCASTING, L.C.

By: 
Lewis J. Paper
Andrew S. Kersting

EXHIBIT A

Declaration of James DiNatale

DECLARATION

I, James DiNatale, hereby declare under penalty of perjury as follows:

1. I am a Senior Library Research Assistant at Dickstein Shapiro Morin & Oshinsky LLP. I was asked to assist in obtaining information concerning the community of Newark, Maryland with respect to a matter which I understand is pending before the Federal Communications Commission in Washington, D.C.

2. On May 6, 2004, I spoke by telephone with Kelly Sadler a postal employee at the Newark Post Office. The Newark Post Office is located at 8420 Newark Road in Newark, Maryland near the intersection of Newark Road and Langmaid. *See Appendix 1 hereto.* The post office serves only Newark and no other community.

3. On May 6, 2004, I spoke by telephone with the ambulance lieutenant of the Newark Fire Department who did not wish to give his name. The Newark Fire Department is located at 8334 Newark Road near the center of Newark. *See Appendix 2 hereto.* The Fire Department has 60 volunteers on its roster, 30 of whom are active. Those volunteers reside primarily within the Newark community and within a five mile radius of the fire station. The response area of the Newark Fire Department is within a 10-15 mile radius of the Newark community. The Newark Fire Department responds to emergencies in other communities only by request.

I hereby declare that the foregoing is true and correct to the best of my knowledge and belief.

Signed and dated this 16th day of June, 2004.


James DiNatale



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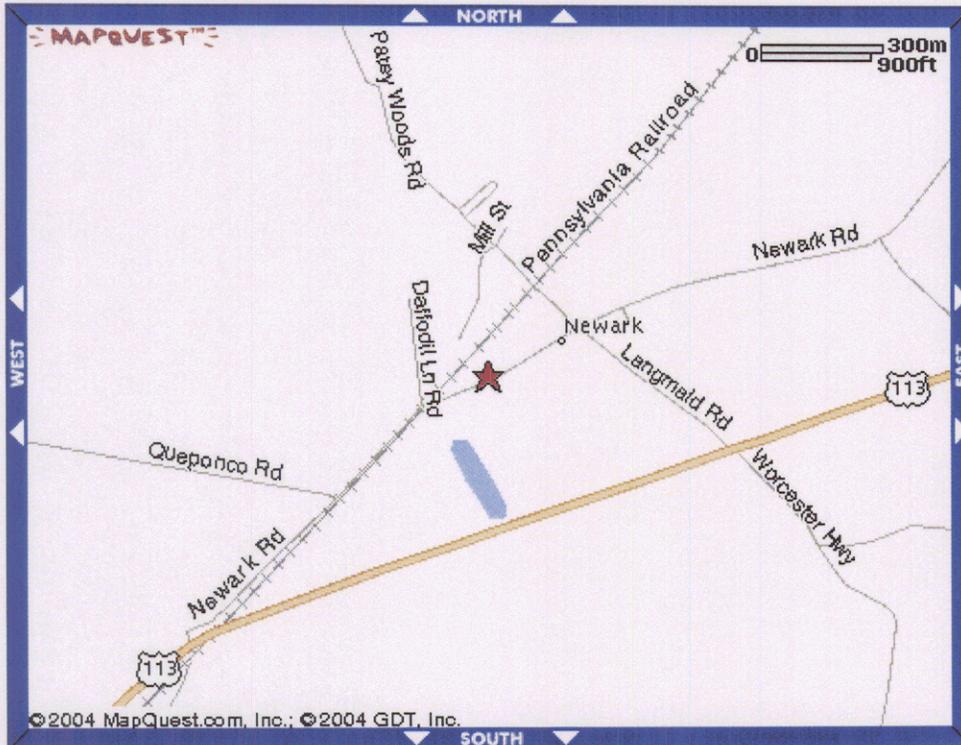
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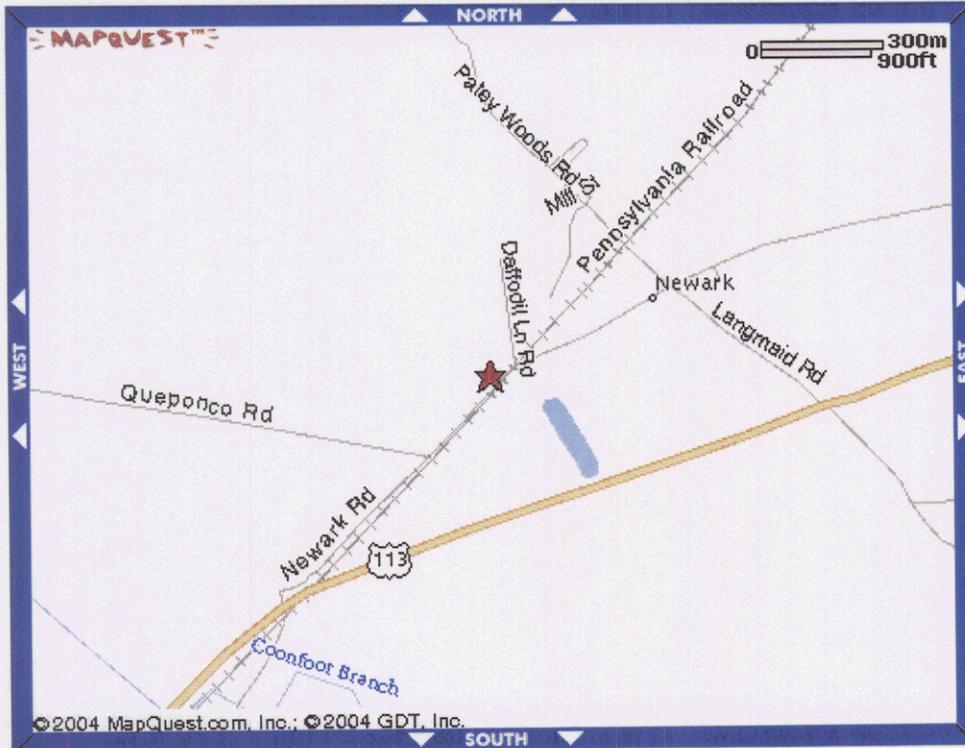
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EXHIBIT B

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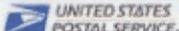
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EXHIBIT C

Declaration of Jacqueline Downs

DECLARATION

I, Jacqueline Downs, hereby declare under penalty of perjury as follows:

1. I am a Library Assistant at Dickstein Shapiro Morin & Oshinsky LLP. I was asked to assist in obtaining information concerning the community of Newark, Maryland.
2. On May 12, 2004, I spoke by telephone with Kelly Sadler, who identified herself as an employee of the United States Postal Service at the Post Office in Newark, Maryland. Ms. Sadler stated that the mail received at the Newark Post Office is sorted and then delivered by the postal carrier to residents in Newark, which has approximately 280 route box holders. There are also 115 postal boxes in the Post Office in Newark.
3. On May 12, 2004, I spoke with a paramedic at the Newark Fire Department who did not wish to give his name. The paramedic stated that virtually all of the fire company's emergency calls are in Newark and within a 10-15 mile radius of the fire station. The only general exceptions involve "mutual assistance" calls from other communities like Ocean City, Maryland, which the paramedic stated occur about once a year.
4. The paramedic also stated that the Newark Fire Department provides both fire and emergency medical services. The volunteers are trained to serve as firefighters and/or as emergency medical technicians.

I hereby declare that the foregoing is true and correct to the best of my knowledge and belief.

Signed and dated this 10th day of June, 2004.

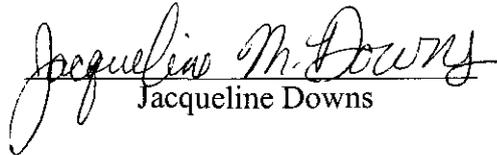

Jacqueline Downs

EXHIBIT D

Declaration of Andrew Kersting

DECLARATION

I, Andrew Kersting, hereby declare under penalty of perjury as follows:

1. I am an attorney with Dickstein Shapiro Morin & Oshinsky LLP, which represents MTS Broadcasting, L.C. in this proceeding. On Wednesday, May 26, 2004, I had a telephone conversation with Reverend Shirley Evans, who serves as Pastor of both the Bowen United Methodist Church ("Bowen Church") and the Trinity United Methodist Church ("Trinity Church") in Newark, Maryland.

2. Pastor Evans stated that the Bowen and Trinity Churches are located in the same building at 8426 Newark Road in Newark. *See* Appendix hereto. She also stated that the Bowen Church has approximately 100 members, while the Trinity Church has approximately 50 members. According to Pastor Evans, fewer people attend services at these churches each week than their respective memberships. Pastor Evans believes that approximately 50% of the people who attend weekly services at the Bowen and Trinity Churches reside in the community of Newark.

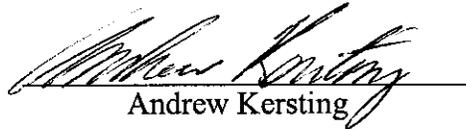
3. Pastor Evans stated that the Bowen and Trinity Churches have two women's groups which meet year round. The United Methodist Women's Group meets once a month in the home of one of the Trinity Church's members. The Women's Circle Group is comprised of a small group of women in the Bowen congregation which meets once a month in the Church.

4. Pastor Evans also stated that the Bowen and Trinity Churches work together to sponsor a vacation bible school which meets for one week during the summer. The bible school is for kids between the ages of pre-school through middle school. The Churches generally have approximately 35 kids attend the vacation bible school. Pastor Evans stated that approximately 75% of the kids are from the Newark community and 25% are from outside Newark.

5. When asked about one of the business establishments in the local community – the “Newark Station” – Pastor Evans stated that it serves as a gas station, a convenience store, and a “grill” for the rural farming community. She stated that farmers often come to the Newark Station for coffee in the morning and that other Newark residents visit the Newark Station for milk, bread, eggs, and an assortment of other food supplies. She has placed orders for fried chicken from the Newark Station on more than one occasion for gatherings at the Bowen and Trinity Churches.

I hereby declare that the foregoing is true and correct to the best of my knowledge and belief.

Signed and dated this 16th day of June, 2004.


Andrew Kersting



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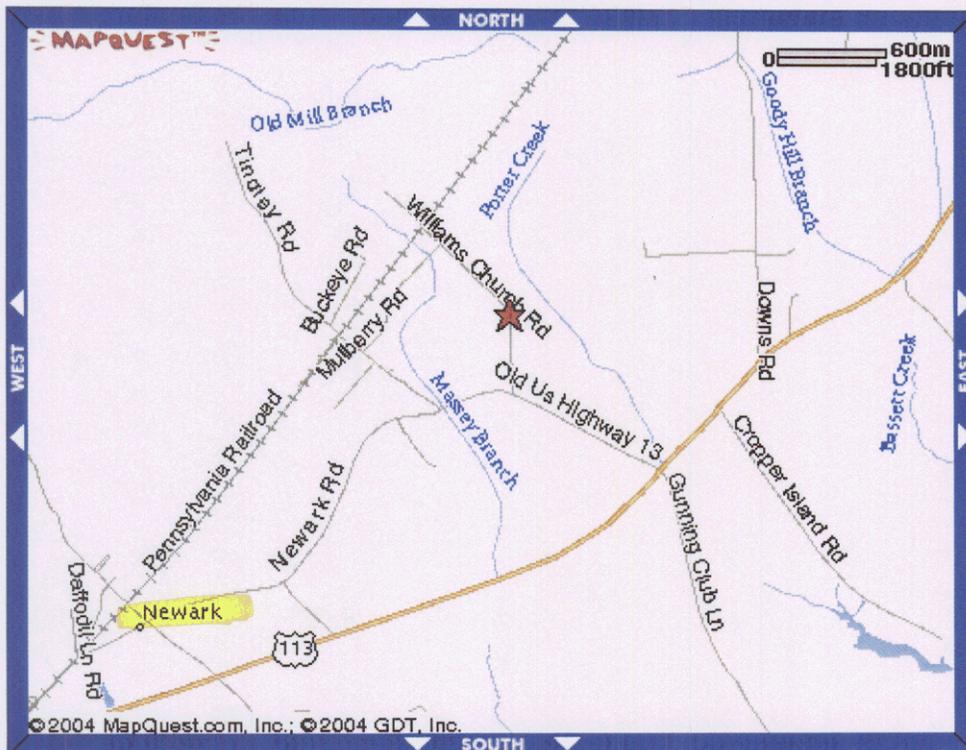
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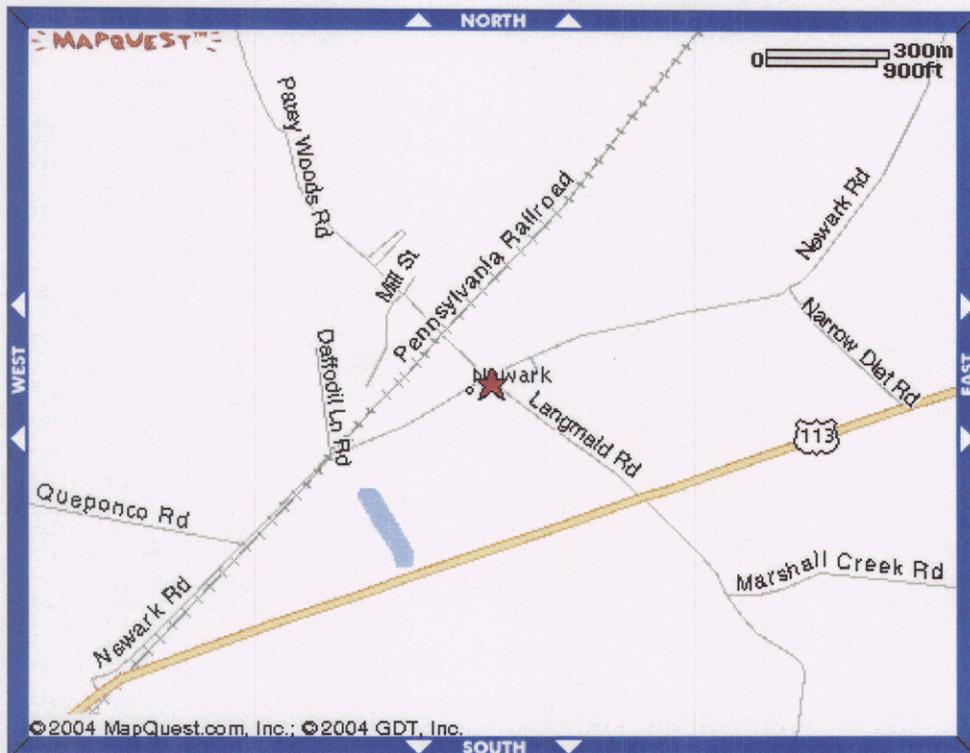
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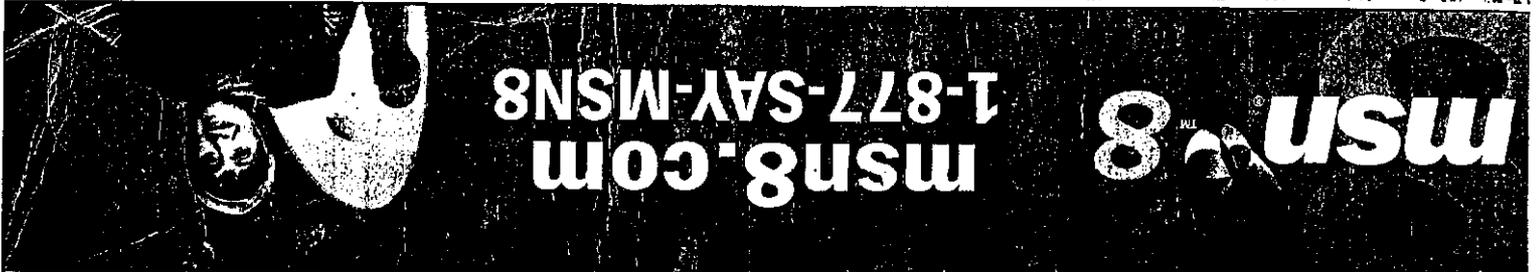
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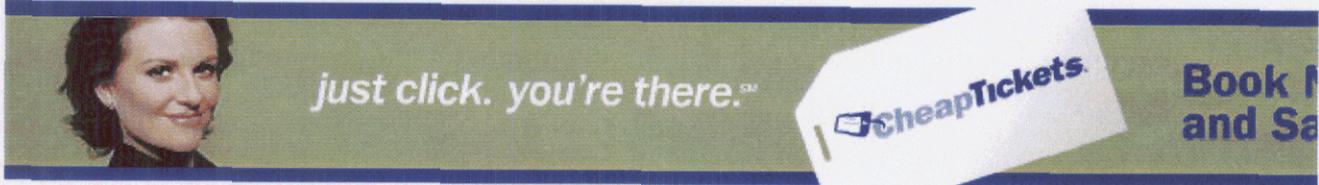
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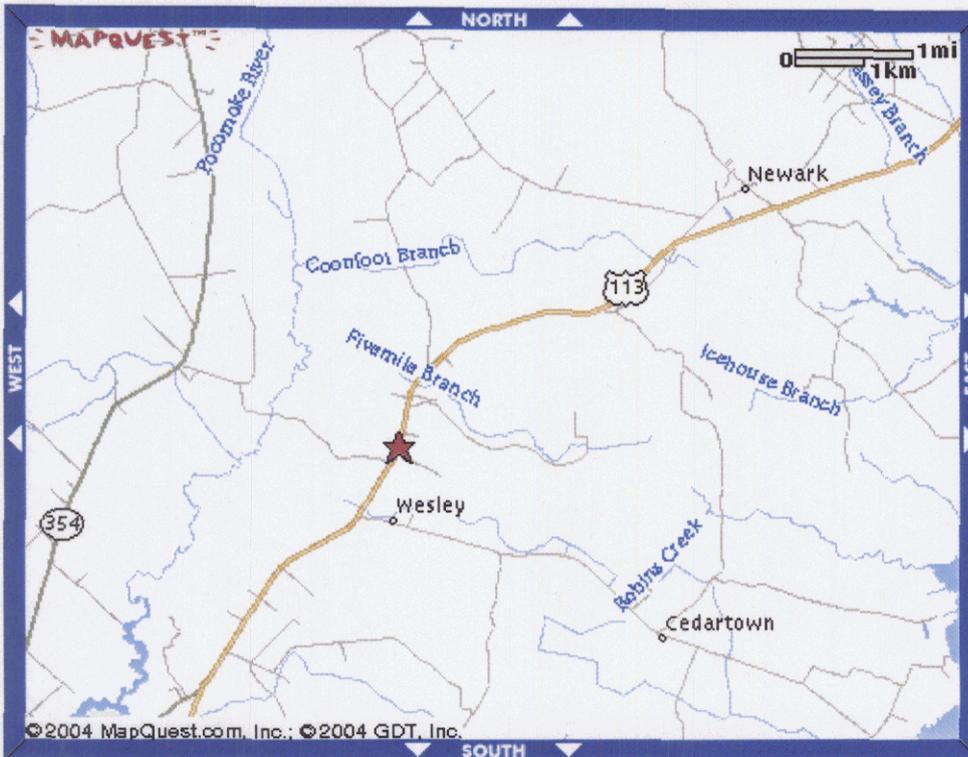
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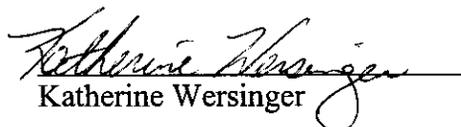
I hereby certify that on this 17th day of June, 2004, a copy of the foregoing "Motion for Leave to File Supplemental Comments" was hand-delivered or sent by first-class mail, postage prepaid, to the following:

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