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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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In the Matter of )  
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Amendment of Section 73.202(b), )  
Table of Allotments, )  
FM Broadcast Stations )  
(Cambridge and St. Michaels, Maryland) )

Federal Communications Commission  
Office of Secretary

MB Docket No. 04-20  
RM-10842

To: The Secretary

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**OPPOSITION TO SUPPLEMENTAL COMMENTS**

CWA Broadcasting, Inc. ("CWA"), the licensee of Station WINX-FM, Cambridge, Maryland (the "Station" or "WINX"), by its attorneys and pursuant to Sections 1.45(b) and 1.420 of the Commission's Rules, hereby opposes the Supplemental Comments filed by MTS Broadcasting, L.C. ("MTS")<sup>1</sup> in the above-referenced proceeding in which CWA seeks to modify the Station's community of license from St. Michaels, Maryland to its original community of license, Cambridge, Maryland, and upgrade its operation to Class B-1 on Channel 232 ("CWA Cambridge Proposal").<sup>2</sup> In its Supplemental Comments, MTS attempts to show that Newark, Maryland is a community for allotment purposes, such that the Commission may properly consider MTS's counterproposal to allot Channel 233A to Newark, Maryland ("MTS Newark Counterproposal"). MTS's efforts fail. In support thereof, CWA states as follows.

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<sup>1</sup> CWA is filing simultaneously herewith an Opposition to MTS's Motion for Leave to File Supplemental Comments. Denial of the Motion would render the Supplemental Comments moot.

<sup>2</sup> On June 30, 2004, CWA submitted a Motion for Extension of Time requesting until July 9, 2004 in which to oppose MTS's Supplemental Comments.

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MTS takes issue in its Supplemental Comments with a number of the facts set forth by CWA in its Reply Comments concerning the status of Newark. The facts, however, speak for themselves. Nothing in MTS's Supplemental Comments overcomes CWA's showing that, under Commission standards, Newark fails to qualify as a community for allotment purposes. Further, an engineering consultant to CWA recently visited Newark in order to confirm certain facts about Newark and to address definitively the claims put forward by MTS.<sup>3</sup> As the attached Report demonstrates, despite MTS's claims to the contrary, Newark does not possess the necessary social, economic, and/or cultural elements to comprise a community for allotment purposes. *See Report, Attachment 1.*

First, MTS attempts to refute CWA's challenge to MTS's claim that Newark has its own post office. According to MTS, a postal employee informed MTS that the post office "serves only the Newark community," and CWA is thus off base in stating that the Newark post office does not support a separate and independent community identity for Newark. *See Supplemental Comments at 1-2.* However, MTS's claims are not entirely accurate. As set forth in the Report, the Newark Post Office delivers to approximately 1,200 mailboxes in the area. There are only 135 households within the Newark Census Designated Place ("CDP"). *See Report at 1-2.* The Newark Post Office does not serve only – or even primarily – Newark, but rather a far larger area, and it thus does not support Newark's status as a separate and independent community. In any event, the Commission has held that the mere presence of a post office is not enough to demonstrate the existence of a bona fide community. *See Rockport, Texas et al., 4 FCC Rcd*

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<sup>3</sup> MTS's information consists of hearsay statements obtained in telephone calls by MTS's attorneys and attorneys' employees. They do not reflect personal knowledge of the matters at issue.

8075, 8076 (1989) (fact that Armstrong, Texas had its own post office not enough to establish Armstrong as community).

Next, MTS attempts to bolster the status of the “Newark Fire Department,” conveniently leaving out the fact that it is a “volunteer” fire department. *See* Supplemental Comments at 2. According to MTS, CWA’s claim that Newark’s Volunteer Fire Department “serves primarily a rural, 50 square mile area” is not supported by the facts. However, CWA’s “claim” is taken directly from the Newark Volunteer Fire Department’s own website: the “Newark Volunteer Fire Company proudly protects 3000 people living in an area of 50 square miles...We operate out of 1 station that protects a primarily rural area.” [www.fire-ems.net/firedept/view/newark2md/](http://www.fire-ems.net/firedept/view/newark2md/). Obviously, the Newark Volunteer Fire Department serves an area and a population well beyond that of the Newark CDP, which consists of 9.6 square miles and 339 persons. *See* Report at 1. Further, as confirmed by CWA’s consultant, but not mentioned by MTS, the Newark Volunteer Fire Department is regularly manned by one individual who is normally there only three days per week. Most of the volunteer equipment drivers are from outside Newark. *See id.* at 2. Thus, as stated in CWA’s Reply Comments, the Newark Volunteer Fire Department does not support Newark’s status as a self-contained, independent community.

MTS also argues that, contrary to CWA’s evidence, the “Newark Station is far more than a gas station” because it contains a convenience store and sells prepared foods. *See* Supplemental Comments at 3. CWA’s Report confirms that Newark Station contains a “small associated convenience store where customers enter to pay for the gasoline” and “four small tables for patrons to sit and eat.” Report at 3. However, CWA fails to see how this makes Newark Station “far more than a gas station,” as this description applies to most of today’s gas stations, which generally incorporate convenience-store type facilities with traditional pump-and-

pay facilities. These gas stations generally have no particular association with the community in which they are located. Similarly, despite its claims to the contrary, MTS has failed to demonstrate that Newark Station in any way “reflects the dynamics...of an integrated community.” Supplemental Comments at 3. The facts submitted by MTS in its Reply Comments in no way constitute the social, economic and cultural indicia of a community.

MTS’s efforts to distinguish Newark from those areas deemed non-communities in the cases cited by CWA also fail. As set forth in CWA’s Reply Comments, under Commission precedent, designation of an area as a CDP (or if the area is incorporated) raises the presumption that the area constitutes a community for allotment purposes (“CDP presumption”). *See Grants and Peralta, New Mexico*, 14 FCC Rcd 21446, 21449 (MMB 1999). The CDP presumption may be rebutted, however, upon showing that, despite an area’s CDP status, it does not possess the social, economic, or cultural characteristics that inform the Commission’s definition of a “community” for allotment purposes. *See id.*; *Stock Island, Florida*, 8 FCC Rcd 343 (MMB 1993); *East Hemet, California et al.*, 4 FCC Rcd 7895 (MMB 1989). Under the standards established by Commission precedent, Newark lacks these characteristics.

For example, the Commission has rejected places such as Peralta, New Mexico, despite Peralta’s listing as a CDP, a population of 3,182 persons, its own zip code, a listed post office, volunteer fire department, and numerous local establishments. *See Grants and Peralta, New Mexico, supra*. The factors the Commission relied upon to reject Peralta also apply (and more so) to Newark: no exclusive post office (despite an independent zip code), no school system or hospital, large portion of residents working outside the area,<sup>4</sup> no local government or elected

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<sup>4</sup> *See* Exhibit E to Reply Comments (average commute time of persons residing in Newark is 32.1 minutes). *See also Danville and Nonesuch, Kentucky*, 18 FCC Rcd 9304, 9306 (MMB 2003).

officials, no municipal services, no local media, no civic or social organizations, and no separate listing for residents and businesses in the telephone book.<sup>5</sup> *See* 14 FCC Rcd at 21449. *See also Stock Island, Florida, supra* (rejecting Stock Island as a community despite its CDP status and presence of volunteer fire department, businessman’s association, and neighborhood improvement program, because petitioner failed to demonstrate that any of the business, political, social or commercial organizations identified themselves with Stock Island); *East Hemet, California, et al., supra* (rejecting East Hemet as a community because petitioner failed to demonstrate that East Hemet had the social, economic or cultural indicia qualifying it as a community for allotment purposes).

Under the standards established in the above-cited cases, the evidence presented by MTS to show that Newark is a community instead demonstrates that it is an “expanded rural area” without the social, economic, or cultural indicia warranting an allotment. *See also Broadview, Montana, 14 FCC Rcd 14101 (1999)* (rejecting Broadview as a community where petitioner failed to demonstrate that listed establishments were “intended to serve Broadview, as opposed to an expanded rural area”). The rural character of Newark is confirmed by the low density population as well as by the signs posted every mile along Route 113, the main road through the area, urging drivers to use their headlights during the day on account of two-way traffic: “Avoid the Fine. Two-Way Traffic. Use Headlights.” Report at 1.

The businesses and establishments cited by MTS likewise fail to demonstrate that Newark is a community rather than an “expanded rural area.” In addition to the Newark Station,

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<sup>5</sup> MTS claims in its Supplemental Comments that unlike Peralta, Newark has a separate listing in the phone book for its residents and businesses. *See* Supplemental Comments at 3, Exhibit H. This argument is belied by MTS’s own evidence. While residents of Newark are identified as such, they are part of a general listing for Somerset-Worcester Counties. Newark does not have a separate listing as a community within the larger phone book and no separate phone book of its own.

MTS relies on the Worcester County Solid Waste Facility, the Queponco Railway Station, Mary Lou's Assisted Care facility, the Worcester Career and Tech Center, and three churches as indicia of Newark's community status. *See* Reply Comments at 5. The evidence MTS relies upon to make its case falls short of the mark.

The Worcester County Solid Waste Facility is a garbage dump that serves the County generally, not Newark specifically. It is located outside the Newark CDP. Yet the very fact that Worcester County has chosen to locate its garbage dump near Newark confirms the rural character of the area.<sup>6</sup> Similarly, the Worcester Career and Tech Center serves the County rather than Newark, and is itself located outside the Newark CDP. *See* Report at 4. Mary Lou's Assisted Care Facility is a private residence (expanded upon to provide assistance to up to four elderly people), a fact consistent with the absence of any commercial presence in Newark. *See id.* The Queponco Railway Station is not operational and functions as a museum with very limited hours (3 hours, two days a month, six months of the year). *See id.* Finally, by MTS's own admission, 50% of the attendees of two out of three of the churches allegedly serving Newark reside outside of the Newark CDP. *See* Supplemental Comments at 6. Even the operation of these churches is questionable, as CWA's consultant could not locate signs indicating when services are held at two of them. *See* Report at 3. The businesses and establishments cited by MTS have no particular nexus to Newark, but rather serve the surrounding areas of which Newark is simply a part. *See Gaviota, California*, 16 FCC Rcd 1518, 1522 (2000) (rejecting Gaviota as a community where petitioner failed to demonstrate nexus between establishments and the community in question). Newark's lack of the important social, economic, and cultural attributes that define a community rebuts any presumption that, as a CDP,

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<sup>6</sup> For example, MTS cites the community of Bethesda, Maryland in its pleading. There is no garbage dump in the vicinity of that community.

it qualifies as a bona fide community. The MTS Newark Counterproposal should therefore be rejected on grounds that Newark does not qualify as a community for allotment purposes.

Apparently in a last ditch effort to derail CWA's Cambridge Proposal to make way for its Newark Counterproposal, MTS also argues that WINX's licensed facilities are not entitled to protection, and thus are no impediment to the allotment of Channel 232A to Stockton, Maryland, as proposed by Route 12 Broadcasters, and not MTS. MTS claims that "[i]f 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." Supplemental Comments at 8. MTS's claims are wide of the mark.

As demonstrated by the Engineering Statement attached as Exhibit D to the Reply Comments, the Route 12 Stockton Counterproposal is in fact short-spaced to the licensed WINX facility, and implementation of the Route 12 Stockton Counterproposal would require the CWA to relocate its transmitter site to a new site. However, MTS's claim that WINX's licensed facilities have no right to protection has no basis in Commission precedent or policy. As established in the Engineering Statement to CWA's Reply Comments, from its existing transmitter site and on its current Channel 232A allotment, WINX provides requisite service to St. Michaels. *See* Exhibit D to Reply Comments. MTS has not presented any engineering to counter this showing.

WINX's current facility is entitled to protection. It is well-established that the Commission "refrain[s] from requiring a transmitter site change by an unwilling licensee or permittee." *Rockport, Texas et al., supra. See also Modification of FM or Television Licenses Pursuant to Section 316 of the Communications Act*, 63 RR 2d 58, 61 n.6 (1987) (noting that in the rulemaking context Commission will not require an affected station to change its transmitter

site to accommodate a channel substitution). The fact that Route 12's Stockton Counterproposal is short-spaced to WINX's existing transmitter site precludes the Route 12 Stockton Counterproposal from consideration.

In conclusion, CWA submits that, as CWA's Reply Comments and its Report demonstrate, Newark, Maryland fails to qualify as a community for allotment purposes. Accordingly, MTS's Newark Counterproposal must be dismissed. MTS's efforts to disqualify CWA's Cambridge Proposal from consideration are simply unavailing.

WHEREFORE, for the foregoing reasons, CWA Broadcasting, Inc. respectfully requests that the Commission dismiss the Supplemental Comments filed by MTS Broadcasting, L.C., grant the Petition for Rulemaking and modify Section 73.202(b) of the Commission's Rules to change the channel 232 allotment from St. Michaels to Cambridge, Maryland, upgrade the allotment from Class A to Class B1, and modify the license of Station WINX-FM accordingly.

Respectfully submitted,

**CWA BROADCASTING, INC.**

By: 

Barry A. Friedman, Esq.  
Thompson Hine LLP  
1920 N Street, N.W.  
Suite 800  
Washington, D.C. 20036  
(202) 331-8800

July 9, 2004

**ATTACHMENT 1**

## **DESCRIPTION OF COMMUNITY OF NEWARK, MD**

prepared for

**CWA Broadcasting, Inc**

WINX-FM Cambridge, Maryland

Facility ID 14774

This report has been prepared on behalf of CWA Broadcasting, Inc., in response to a request for a “first person” assessment of the community indicia for Newark, Maryland. The observations made during a visit to Newark, Maryland conducted on June 30, 2004 are:

### **Newark CDP:**

The Newark CDP boundary is established primarily by several roads: Route 113 to the east, Newark Road and Basket Switch Road to the South, Patey Woods Road and Bethards Road to the west, and Ironshire Station Road to the north. Most of the population and the few institutions are located in the southern section of the Newark CDP, along or near Newark Road.

Newark is a CDP consisting of an area of 24.8 square km (9.6 sq mi). Approximately 16.2 sq km (65.3%) is wooded. (This is based upon an inspection of an USGS topographic map, which closely corresponded to the observed conditions). According to year 2000 U. S. Census data, the total population within the Newark, Maryland CDP boundary is 339 persons in 135 households, occupying 152 housing units (17 vacant). The calculated population density is 35.3 persons per square mile.

### **Area Observations**

#### Characterization

This area is largely rural in nature. The main road through the area (Route 113) has signs posted approximately every mile reminding drivers to use their headlights during the day because of the two-way traffic: “Avoid the Fine. Two-Way Traffic. Use Headlights.”

#### Local Fire Department

The Newark Volunteer Fire Department is located approximately 0.5 mile from Route 113 on Newark Road. I met the individual who is in charge of the Newark area fire station “most of the

## **Description of Newark, Maryland**

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time”. According to him, the Newark Volunteer Fire Department is manned by one individual only 3 days per week consistently (7:30 am to 5:00 pm), with an occasional 4<sup>th</sup>, and sometimes 5<sup>th</sup> day by another person. Most equipment drivers are from outside of Newark. The Newark Volunteer Fire Department website<sup>1</sup> says that the “Newark Volunteer Fire Company proudly protects 3000 people living in an area of 50 square miles. We operate out of 1 station that protects *a primarily rural area*” (emphasis added). Based on these figures, the area population density is 60 persons per square mile. However, the basis for these figures is not known. Based on this information, the population density outside of the Newark CDP is greater than the population density inside the Newark CDP.

By contrast, accessing official U. S. Census population information, to achieve a similar (3,000 person) population count would require a circle drawn from the Newark Volunteer Fire Station with a radius of approximately 9.7 km<sup>2</sup>. A circle of this size just touches Berlin and just falls short of Snow Hill, and would encompass 2,828 persons in 295.6 square km (114 square miles). This population density is 24.8 persons per square mile (compared to the 35.3 persons per square mile in the Newark CDP).

### **Local Post Office**

I spoke with Mary Jane Pusey, who is an employee at the Newark, Maryland U. S. Post Office. The building is approximately the size of a single floor residence and is located on Newark Road near the intersection with Langmaid Road. Ms. Pusey informed me that they deliver to approximately 1,200 mailboxes in the area consisting of the Newark CDP and locations beyond, including “several large facilities” such as the Worcester County Board of Education and a “major petroleum distribution facility for the eastern shore.” Both of these facilities appear to be located outside of the Newark, MD CDP area.

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<sup>1</sup>[www.fire-ems.net/firedept/view/newark2md/](http://www.fire-ems.net/firedept/view/newark2md/)

<sup>2</sup>The Newark Volunteer Fire station is located almost exactly halfway between the towns of Berlin (to the north east), and Snow Hill (to the south west).

## **Description of Newark, Maryland**

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### **Bank**

The “Peninsula Bank” is right next door to the Newark, MD Post Office, at the intersection of Newark Road and Langmaid Road. It is a small bank, with four teller windows. There was one person behind the counter just after 12:30 pm, and another who came out from the vault area when I entered. There were no customers inside the bank when I went inside during the lunch hour.

### **Local Churches**

The “Trinity United Methodist Church” is located almost across the street from the Volunteer Fire Department. There was no sign indicating when services were held.

The “Bowen United Methodist Church” is across the street from the Post Office. A sign at the front lists the pastors as Shirley and Stewart Evans.

With the help of a Maryland State police officer, I was finally able to locate the “Williams A.M.E.” Church approximately 0.7 miles off Newark Road, on Mulberry Road. There were no signs to identify the pastor of the church, or when the church holds its services.

### **Educational Facilities**

The “Worcester Career and Technology Center” is located approximately two miles south of the Newark CDP boundary on Route 113.

### **Newark Station**

“Newark Station” is an Exxon affiliated gas station facility located on Route 113 near Langmaid Road, with a small associated convenience store where customers enter to pay for gasoline. There were four small tables for patrons to sit and eat. I saw no one eating in the Newark Station when I was there at lunch time. The gas station consisted of 4 double-sided pumps. There were employees present during the lunch hour running the cash register, cooking behind the counter, and stocking the shelves with merchandise.

## **Description of Newark, Maryland**

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### **Miscellaneous Facilities**

An assisted care facility, which looks like a large residence from the outside, had a dilapidated sign outside indicating that this was "Mary Lou's Assisted Care". There were a couple of ramps installed to provide handicap access. It turns out that it is a residence, with Mary Lou and her daughter acting as the primary care givers, along with two other women who provide 24 hour assistance for up to four elderly people.

The "Queponco Railway Station" is a restored railway station which has been placed on the National Register of Historic Places. It functions currently only as a museum with very limited hours of operation. It is open on the first and third Saturdays between 1:00 pm and 4:00 pm May through October.

The Worchester County solid waste facility is a garbage dump located outside the Newark CDP only two tenths of a mile from the Worchester Career and Technology Center.

### **Certification**

The undersigned hereby certifies that the foregoing statement was prepared by him, and that it is true and correct to the best of his knowledge and belief. Mr. Clinton is a staff engineer in the firm of Cavell, Mertz & Davis, Inc.



Robert J. Clinton  
July 8, 2004

Cavell, Mertz & Davis, Inc.  
7839 Ashton Avenue  
Manassas, VA 20109  
(703) 392-9090

**CERTIFICATE OF SERVICE**

I, John C. Butcher, hereby certify that I have served on this 9<sup>th</sup> day of June, 2004, a copy of the foregoing **Opposition to Supplemental Comments** upon the following parties by first-class mail, postage pre-paid:

Lewis J. Paper  
Andrew S. Kersting  
Dickstein Shapiro Morin & Oshinsky LLP  
2101 L Street, N.W.  
Washington, D.C. 20037-1526

Cary S. Tepper  
Booth, Freret, Imlay & Tepper, P.C.  
7900 Wisconsin Avenue  
Suite 304  
Bethesda, MD 20814-3628

John A. Karousos, Assistant Chief\*  
Audio Division  
Media Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Room 3-A266  
Washington, D.C. 20554

R. Barthen Gorman\*  
Audio Division  
Media Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Room 3-A224  
Washington, D.C. 20554

  
\_\_\_\_\_  
John C. Butcher

\*By Hand