

ORIGINAL

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Amendment of Section 73.202(b))	
Table of Allotments)	MB Docket No. 03-44
FM Broadcast Stations)	RM - 10650
(Water Mill and Noyack, New York))	RM - 11396
)	

To: The Commission

FILED/ACCEPTED

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*Federal Communications Commission
Office of the Secretary*

Respectfully Submitted,

SACRED HEART UNIVERSITY, INC.

By: Mark N. Lipp
Scott Woodworth
Wiley Rein LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7500

Its Counsel

October 9, 2008

TABLE OF CONTENTS

BACKGROUND2

I. WHETHER SHU'S COUNTERPROPOSAL CONSTITUTES A PROHIBITED
ALTERNATIVE PROPOSAL5

II. WHETHER THE BUREAU'S NEWLY ANNOUNCED POLICY ON NONADJACENT
DOWNGRADES IS GROUNDED ON VALID POLICY OBJECTIVES AND LEGAL
DICTATES8

SUMMARY

Sacred Heart University, Inc. ("SHU"), licensee of Station WSUF(FM), Noyack, NY and translator Station W277AB, Noyack, NY, filed Comments and Counterproposal in response to the *Notice of Proposed Rule Making* proposing the allotment of Ch. 277A at Water Mill, NY. SHU suggested that Ch. 233A be allotted instead to protect the translator station. SHU also counterproposed the allotment of Ch. *277A to Noyack, NY so that Station WSUF's license could be modified from Ch. 210B1 to Ch. *277A at Noyack, NY in order to improve its directional, horizontally polarized 1.9 kW facility which was protecting Ch. 6 Station WLNE, New Bedford, MA.

In the *Report and Order*, the Media Bureau ("Bureau") agreed to the alternate Channel 233A at Water Mill, NY, but failed to consider the SHU's Counterproposal. As a result, SHU filed a Petition for Reconsideration. In its *Memorandum Opinion and Order* ("MO&O"), the Bureau held that the Counterproposal was a prohibited alternative proposal, that the Ch. 6 protection will be eliminated when the digital transition ends early next year, and announced a new Downgrade Policy which requires nonadjacent lower class modifications to be subjected to the solicitation of other expressions of intent and an equivalent alternative channel be available for those interests.

SHU filed its Counterproposal in 2003 in order to eliminate Ch. 6 interference protection and improve its facility even though it involved a lower class. In addition, SHU was concerned with the potential loss of its translator. The Bureau did not dismiss SHU's Counterproposal as a prohibited alternative proposal in the *Report and Order*. Had the Bureau done so, SHU could have filed the Ch. *277A proposal for Noyack in a separate rule making petition. Rather, the

Bureau accepted the Counterproposal on reconsideration by issuing a Public Notice in 2007 and requested reply comments.

The Commission has never before held that filing comments to suggest an alternate channel for another party's proposal and a Counterproposal was a prohibitive alternative proposal. The case cited by the Bureau to support its conclusion is distinguishable. SHU maintains that the Bureau misconstrued SHU's intentions and should not have denied the Counterproposal on that basis.

As for Ch. 6, the Bureau has consistently stated that it would not base its decisions on the expected transition of a Ch. 6 station changing to another channel early next year.

As a result, SHU believes that the Bureau's real purpose was to announce its new Downgrade Policy but realized that it could not deny the Counterproposal on retroactive application of this policy. In this regard, the new Downgrade Policy reverses more than 20 years of case law and offers inadequate policy and legal reasons for doing so. Rather, the Bureau's reasoning is primarily based on principles of logic and a literal reading of a rule with no context. However, as a legal and policy matter, SHU believes the Bureau's new policy is unjustified. The "plain language" of Section 1.420(g) has been misinterpreted based on past case law and prior Commission decisions. Furthermore, SHU is unaware of any party ever challenging the previous policy of allowing modifications to nonadjacent lower class channels or expressing an interest. Indeed, the issue was not raised in this proceeding. The Bureau seems to be trying to find a solution where there is no problem to solve. Accordingly, the Commission should reverse the Bureau and modify Station WSUF to Ch. *277A at Noyack, NY.

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To: The Commission

APPLICATION FOR REVIEW

Sacred Heart University, Inc. ("SHU"), licensee of Station WSUF(FM), Noyack, NY and translator Station W277AB, Noyack, NY, by its counsel, hereby submits this Application for Review of the *Memorandum Opinion and Order* ("MO&O")(DA 08-1956), released August 22, 2008, in the above captioned proceeding.¹ The MO&O denied SHU's Counterproposal, filed on April 11, 2003, requesting the allotment of Channel *277A to Noyack, NY and the modification of Station WSUF(FM)'s license to specify that channel. In the MO&O, the Media Bureau ("Bureau") (1) found that this Counterproposal constituted an alternative proposal in violation of its policy, (2) refused to acknowledge the existence of interference caused by a nearby Channel 6 TV station because that station will be changing channels as part of the digital transition early next year and (3) created a new policy prohibiting the modification of an existing station to a lower class nonadjacent channel except where an alternate channel exists for interested parties. The Commission should reverse the action of the Bureau because it is in conflict with case

¹ The Federal Register publication of the MO&O occurred on September 9, 2008. 73 Fed. Reg. 52213. Pursuant to Sections 1.115(d) and 1.4(b) of the Commission's Rules, this pleading is timely filed within 30 days of public notice.

precedent, relies on incorrect factual assumptions and is inconsistent with previous policy pronouncements in similar circumstances. In support hereof, SHU states as follows:

BACKGROUND

1. The proceeding was initiated by the Petition for Rule Making filed on August 12, 2002, by Isabel Sepulveda, Inc. ("Sepulveda"), requesting the allotment of Channel 277A to Water Mill, NY, as its first local service.² The Bureau issued the *Notice of Proposed Rule Making*³ proposing that channel for Water Mill in Feb. 2003.

2. In response, SHU filed Comments and Counterproposal. SHU commented that it had no objection to the provision of a first local service at Water Mill, NY, but instead of the proposed Channel 277A, SHU suggested Channel 233A so that its translator (W277AB) would not be forced off the air.⁴ SHU demonstrated that it had obtained this translator as part of a settlement during two comparative hearings with several other applicants that had lasted several years.⁵ SHU went to great expense to compete in the comparative hearings which were rarely held for new noncommercial educational ("NCE") facilities. In recognition for SHU's willingness to settle and allow two other applicants to obtain new NCE facilities, the Commission waived Section 74.1235 of its Rules and authorized super-powered status to the Noyack translator as well as to three other translators on Long Island.⁶ The Commission found

² As will be discussed, this Petition violated Section 1.52 of the Commission's Rules because it was not verified. In addition, Sepulveda failed to verify its expression of interest in initial comments and in its later pleadings.

³ 18 FCC Rcd 2387 (MB 2003)

⁴ SHU Comments at 2.

⁵ See *Sacred Heart University*, 8 FCC Rcd 612 (1993). This decision was attached to SHU's Comments and Counterproposal as Exhibit 1.

⁶ *Id.*

that these translators would provide NCE service to areas on Long Island which were unserved or underserved justifying the waiver.⁷ Although SHU recognized that it would not be entitled to protection against new or modified full service stations, SHU believed that it had a legitimate right to suggest an alternative channel to satisfy the interest of Sepulveda in providing a first local service to Water Mill.

3. In addition, SHU submitted a Counterproposal to allot Channel *277A to Noyack reserved for NCE use and to modify the license of Station WSUF which operates on Channel 210B1 at Noyack to specify Channel *277A.⁸ SHU did indicate that its primary objective at the time was to protect its translator but realized that the translator was vulnerable to a future use of Ch. 277. Thus, SHU decided to file a counterproposal to change the channel for Station WSUF in order to eliminate its horizontal polarization to protect Channel 6 Station WLNE-TV New Bedford, MA.⁹ SHU made an appropriate showing that the protection accorded to Station WLNE, limited the signal of Station WSUF to such an extent that a Class A operation could be considered an improvement over its horizontally polarized 1.9 kW directional facility. SHU also cited precedent for the modification of a NCE station from the reserved band to a reserved channel in the nonreserved band.

4. Three years later in 2006, the Bureau issued its *Report and Order*¹⁰ allotting Channel 233A to Water Mill instead of Channel 277A as suggested by SHU. However, the

⁷ *Id.*

⁸ SHU's translator rebroadcasts Station WSHU(FM), Fairfield, CT and provides NPR service to the easternmost portion of the island.

⁹ SHU's Comments at 3-4.

¹⁰ 21 FCC Rcd 1150 (MB 2006).

Bureau failed to consider SHU's Counterproposal to allot Channel *277A at Noyack although the Bureau did acknowledge that SHU had requested this allotment.

5. Petitions for Reconsideration were filed by SHU and Monroe Board of Education ("Monroe"). Monroe is the licensee of three translators on Long Island and claimed that Channel 233A at Water Mill would displace each one.¹¹ In addition, Monroe claimed that it did not receive notice that the Bureau was considering Channel 233 and therefore did not participate at the earlier stage.¹² Monroe argued that the Bureau should not favor SHU's translator over Monroe's three translators when deciding which channel should be allotted to Water Mill.¹³

6. SHU filed its Petition for Reconsideration because the Bureau failed to consider its Counterproposal. SHU demonstrated that its proposal conformed to all Commission policies with respect to reservation of commercial channels for NCE use and cited case law for the modification of an NCE station from the reserved band to a reserved channel in the commercial band.¹⁴ The Bureau accepted the Counterproposal and issued a Public Notice on August 28, 2007 (Report No. 2830) requesting comments on the Counterproposal. Sepulveda filed Comments reaffirming its interest.

7. SHU responded by pointing out to the Commission that Sepulveda failed in every one of its pleadings to verify its expression of interest in violation of Section 1.52 of the

¹¹ SHU demonstrated that one of Monroe's translators would not be affected by Channel 233 at Water Mill and the other two translators could be modified to other channels.

¹² Monroe Pet for Recons at 3-5.

¹³ *Id.*

¹⁴ SHU Pet for Recons at 2.

Commission's Rules.¹⁵ Such a defect is considered an abuse of process and cannot be cured when it would adversely affect another party's interest.¹⁶

8. Thus, based on the unexpected filing of a Petition for Reconsideration by Monroe, and the failure of Sepulveda to verify its expression of interest, the circumstances in this proceeding had changed significantly since the filing of SHU's Counterproposal in 2003. SHU claimed that these changed circumstances provided additional justification for consideration of its request to reserve Ch.*277A at Noyack, New York for noncommercial educational use under Section 1.429 of the Commission's Rules.¹⁷ In addition, SHU noted that with the elimination of the Sepulveda proposal for failure to verify and the fact that Monroe's translators were no longer at risk, the only proposal left for consideration was the allotment and reservation of Ch.*277A at Noyack for WSUF's use.

I. WHETHER SHU'S COUNTERPROPOSAL CONSTITUTES A PROHIBITED ALTERNATIVE PROPOSAL

9. The Bureau cites *Winslow, Camp Verde, Mayer and Sun City West, Arizona*, ("MO&O"), 16 FCC Rcd 9551 (MMB 2001) ("*Winslow*") as the case that set forth the policy that alternative proposals are prohibited. In *Winslow*, the Petitioner proposed to change community of license of its station to one of two different communities on an alternate basis. When the Bureau decided to approve one the communities, the proponent sought reconsideration disagreeing with the Bureau's reasons for not favoring the proponent's other community. The

¹⁵ See Reply dated August 17, 2007.

¹⁶ *Lincoln, Orange Beach, Steelville, and Warsaw, Missouri*, 17 FCC Rcd 6119, 6123 (2002).

¹⁷ Reply Comments at 3. See, e.g. *Blackshear, Richmond Hill and Folkston, Georgia*, 4 FC Rcd 1608 (1989) (Commission reversed its decision in underlying rule making proceeding based on changed circumstances noted in petitions for reconsideration filed pursuant to Section 1.429).

Bureau expressed frustration with the proponent and responded with the following new policy pronouncement,

“We also take this opportunity to advise that effective upon publication of this Memorandum Opinion and Order in the Federal Register, we will no longer entertain optional or alternative proposals presented in either an initial petition for rule making or in a counterproposal. There is no provision in our Rules requiring us to consider such proposals. Based on our experience, even a single optional or alternative proposal has required us to speculate on the proposal actually preferred by the proponent or what proposal would, in our view, have the greatest public interest benefit....If a proponent subsequently disagrees.....it could seek reconsideration.”

10. In the present case, SHU did not offer alternative proposals. SHU filed comments to the NPRM which proposed to allot Channel 277A to Water Mill. SHU was not proposing a channel allotment at Water Mill. SHU had not expressed an interest in operating a new station at Water Mill. This is an important point. In order for a proposal to be valid, a party must express an interest in the channel. Here, SHU never expressed an interest in Channel 233A at Water Mill. Instead, SHU suggested that Channel 233A be allotted. SHU was only trying to accommodate the interest expressed by Sepulveda and should not be penalized for trying to provide for a first local service at Water Mill while also proposing a substitute channel at Noyack with a request to modify its own station to the new channel. If the Bureau is saying that it would prefer to have proponents file a counterproposal and not offer a solution to the conflict, then it should make it clear that such “alternatives” are problematic for the Bureau. It appears that SHU’s only failing was the use of the word “alternative” when it offered the alternative Water

Mill channel and the Counterproposal in the same pleading. But despite the use of the word, the Bureau did not dismiss the counterproposal on that basis in the *Report and Order*.¹⁸ Had the Bureau done so, SHU could have refiled its proposal as a new petition for rule.¹⁹ Rather, the Bureau reviewed the Petition for Reconsideration and decided that the Counterproposal should be accepted for consideration and issued a Public Notice on August 28, 2007, requesting reply comments on the proposal.

11. As discussed, this proceeding is distinguishable from *Winslow* because *Winslow* involved two alternative proposals offered by a party who had expressed interest in both proposals. Here, SHU did not offer two proposals. Rather, it offered an alternate channel for the Water Mill allotment and its own proposal for WSUF. Furthermore, having failed to dismiss the Counterproposal earlier pursuant to the *Winslow* decision and having decided to issue a Public Notice accepting the proposal four (4) years later, it is disingenuous of the Bureau to now rule that the proposal is unacceptable. Irrespective of the fact that this proceeding is distinguishable from the Bureau's decision in *Winslow*, it is also noteworthy that the Commission reversed the Bureau in the *Winslow* case on Application for Review and decided that circumstances had changed and thereby granted the proponent's second alternative proposal.²⁰ SHU finds the Bureau's holding unsatisfactory given the changed circumstances set forth in this case, the attempts of SHU to find a solution to the Water Mill conflict, the concerns expressed by the Monroe Board of Education and the public interest benefits in SHU's Counterproposal.

¹⁸ It is also important to note that in rule making proceedings, the Commission routinely permits the use of alternate channels to eliminate conflicts and a counterproposal in the same filing. See *Wheatland, Wyoming, et al.*, 21 FCC Rcd 47 (2006); *Cameron, Arizona, et al.*, 19 FCC Rcd 6846 (2004); *Ketchum, Idaho, et al.*, 19 FCC Rcd 292 (2004).

¹⁹ In *Winslow*, the Bureau stated, "[t]he appropriate procedure would be to file a separate proposal in a subsequent rulemaking proceeding" at 9555.

²⁰ *Winslow*, 17 FCC Rcd 14688 (2002).

12. The Bureau also denied the Counterproposal on reconsideration because the Channel 6 protection that SHU's station affords Station WLNE(TV), New Bedford, MA, "will be eliminated by the station's move to Channel 49 as part of the transition from analog to digital television....."²¹ But this position is directly contrary to the position the Bureau has consistently taken on requests for new and modified NCE stations during the past year.²² It is not clear how the Bureau reconciles its consistent refusal to allow NCE stations to rely on the elimination of Channel 6 by Feb. 2009 with the Bureau's reliance on the elimination of Channel 6 in this proceeding. Again SHU finds the Bureau's explanation unsatisfactory.

II. WHETHER THE BUREAU'S NEWLY ANNOUNCED POLICY ON NONADJACENT DOWNGRADES IS GROUNDED ON VALID POLICY OBJECTIVES AND LEGAL DICTATES

13. Although the Bureau did not deny the SHU Counterproposal at an earlier stage in this proceeding due to the request for a nonadjacent lower class of channel ("downgrade") and, indeed, has never before held that a station cannot be modified to a nonadjacent lower class channel (without soliciting other expressions of interest), the Bureau apparently now believes it was the appropriate time to announce a new policy. In doing so, the Bureau ostensibly reviewed past instances where it granted requests for nonadjacent lower class channels and presumably considers these actions as inadvertent because these cases fail to discuss or explain the policy. The proposal to substitute and modify an existing station to a nonadjacent channel was first discussed in the case of *Cheyenne, WY*,²³ where the Commission found that the Ashbacker²⁴

²¹ *MO&O* at para. 13.

²² See e.g., Letter to Mr. A. T. Moore, President, Family Life Educational Foundation, 23 FCC Rcd 4779 (MB 2008) where the Bureau rejected an application which relied on the consent of the nearby Channel 6 station to an arrangement whereby the NCE station would not commence operations until the Channel 6 station changed channels. The Bureau called this arrangement contingent and not in accordance with the contingent application rule.

²³ 62 FCC2d 63 (1976).

doctrine did not prohibit the modification of an existing station license to a superior channel if there were other expressions of interest in the higher class channel and as long as another equivalent channel was available for application. At that time only Class A and C channels existed in most of the country with Class B channels located in the northeast portion of the U.S. and part of California, so downgrades were not requested.

14. Then in 1984, the Commission established a general rule codifying the *Cheyenne* policy.²⁵ It recognized that it was unnecessary to subject a station to an application process (and cut off notices) if there were no other expressions of interest. The Commission, in effect, established eligibility standards for stations desiring to upgrade their stations based on a finding that it was in the public interest to allow the improvements in service. Underlying this analysis was the belief that all interested parties had a chance to apply for the original allotment but not a higher class channel. So fairness dictated that some procedure should exist to provide an opportunity to apply for a higher class channel in that community. It is noteworthy that the Commission did not address the possibility that stations may encounter the same *Ashbacker* considerations if a station wanted to change to an equivalent class of channel or a lower class channel. Consistent with that reasoning was the belief that if a party wanted to apply for the same class or a lower class, it could have done so when the original allotment was available for application. The Commission also addressed the *Ashbacker* implications of adjacent channel modifications,²⁶ downgrade applications on adjacent and co-channels²⁷ and the one step

²⁴ *Ashbacker Radio Corp v. FCC*, 326 U.S. 327 (1945).

²⁵ *Amendment of the Commission's Rules Regarding the Modification of FM and Television Station Licenses*, 98 FCC 2d 916 (1984), recons. denied, FCC 86-32, rel. January, 17, 1986.

²⁶ *Amendment of the Commission's Rules Regarding the Modification of FM Broadcast Licenses to Higher Class C0-channel and Adjacent Channels ("Modification of Station Licenses")*, 60 RR.2d 114 (1986).

modification application process.²⁸ In each instance, the Commission could have but did not impose the same requirement on nonadjacent lower class petitions to provide an additional equivalent channel for interested parties.

15. The Bureau has consistently approved nonadjacent lower class proposals without offering the opportunity for additional expressions of interest. *See, e.g., Opal and Reliance, Wyoming, et al.*, 20 FCC Rcd 12994 (2005) (granted nonadjacent downgrade from 265C2 to 261A at Price, Utah, without considering or soliciting competing expressions of interest); *Dinosaur and Rangely, Colorado, et al.*, 19 FCC Rcd 10327 (2004) (granted nonadjacent downgrade from 259C1 to 250C2 at Green River, Wyoming, without considering or soliciting competing expressions of interest); *Crowell, Texas, et al.*, 19 FCC Rcd 5347 (2004) (granted nonadjacent downgrade from 253C to 229C1 at Elk City, Oklahoma, without considering or soliciting competing expressions of interest); *Bethel Springs, Tennessee, et al.*, 17 FCC Rcd 14472 (2002) (granted nonadjacent downgrade from 267C3 to 247A at Tiptonville, Tennessee, without considering or soliciting competing expressions of interest); *Eldorado, Texas, et al.*, 15 FCC Rcd 9179 (2000) (granted nonadjacent downgrade from 250C2 to 296A at Beeville, Texas, without considering or soliciting competing expressions of interest); *Pauls Valley, Oklahoma, et al.*, 13 FCC Rcd 13459 (1998) (granted nonadjacent downgrade from 265C3 to 291A at Sulphur, Oklahoma without considering or soliciting competing expressions of interest); *Shelley and Island Park, Idaho*, DA 98-850 (1998) (granted nonadjacent downgrade from 300C to 292C1 at Shelley, Idaho without considering or soliciting competing expressions of interest); *Altamont*,

²⁷ *Revision of Section 73.3573(a)(1) of the Commission's Rules Concerning the Lower Classification of an FM Allotment*, 4 FCC Rcd 2413 (1989)

²⁸ *Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application*, 8 FCC Rcd 4735 (1993).

Oregon, et al., 7 FCC Rcd 4599 (1992) (granted nonadjacent downgrade from 267C to 249C1 at Altamont, Oregon without considering or soliciting competing expressions of interest).²⁹

16. With that history in mind and with no party raising the issue in this proceeding, the Bureau decided to raise the issue itself and announce a new Downgrade Policy for the reason that former case law "is inconsistent with the plain language of the rule (Section 1.420(g)), the limited guidance provided by the Commission on this issue, and current nonreserved band license modification policy."³⁰ Section 1.420(g) provides that the Commission may modify the license of an FM station to another class of channel if there are no other interests expressed or if there is another equivalent class of channel for the interests that are expressed. The Bureau decided that this language was intended to include a nonadjacent lower class of channel despite the fact that it had not previously made that interpretation in the 23 years since the Commission first ruled on this issue and since the *Key West and Hialeah, FL* case was decided.³¹ The Bureau relies on a Commission statement in *Modification of Station Licenses* that it would not modify a UHF station to a nonadjacent UHF channel or a VHF station to a nonadjacent VHF channel without offering the other interested parties the opportunity to apply.³² No cases are cited where this procedure was actually used. However, in the FM context it is clear that the Commission will modify a Class A to another nonadjacent Class A channel (or any other class of channel to the same nonadjacent class of channel) without offering the opportunity for other expressions of

²⁹ The Bureau also cites *Key West and Hialeah, FL*, 50 Fed. Reg. 26229 (1985) where the Bureau decided that the Commission action in *Modification of Station Licenses, supra*, did not require the opportunity for other expressions of interest for a downgrade in the class of an existing station's channel, expressly distinguishing the procedure when a station is upgrading its class of channel.

³⁰ *Water Mill* at para. 14.

³¹ Note 28, *supra*.

³² *Modification of Station Licenses* at 921-922.

interest.³³ Thus, the television example is not relevant to the interpretation of Section 1.420(g) in this instance.

17. The Bureau also tries to justify its decision by making an argument based on principals of logic, i.e. if the Commission has not stated that lower class channels are exempt from the rule, then they must not be exempt. This logic is inconsistent with more than 20 years of case law. Furthermore, there is no policy or legal reason to allow the modification of a station license to the same class of channels (in the same community) but not to the lower class of channel. Licensees rarely request lower class channels. If they do make such a request, it is often out of necessity due to transmitter site availability issues or FAA height limitations or some other technical reason. The *Ashbacker* doctrine is useful in this analysis. That doctrine is based on procedural fairness. If one applicant is able to obtain a license where there has not been an opportunity for another interested party to obtain a license, then the application must be subjected to competing applications. In the case of nonadjacent higher class channels, there is clearly an improved facility being requested which has not been offered to others. In the case of a same class nonadjacent channel facility, any improvements are considered minor. In the case of a lower class facility, there is generally a diminution in service. Thus, the *Ashbacker* doctrine has not been construed to apply to downgrades. In fact, SHU is unaware of any instance where a party has argued that a proposed modification to a nonadjacent lower class channel should not be approved because that party wanted to file a competing application. Nevertheless, the Bureau apparently had some reason to raise the issue here and without asking for comments or referring the case for Commission review, created a new policy. Such action is an effort to create a

³³ E. g., in the recent case of *Arlington and Boardman, OR, et al.*, (DA 08-1721) rel. July 25, 2008, the Bureau granted the substitution of five (5) same class nonadjacent channels and two (2) lower class nonadjacent channels and the modification of the respective station licenses without soliciting expressions of interest from other parties.

solution to a "problem" that does not exist. Such action is clearly beyond the Bureau's delegated authority.³⁴

18. Finally, the Bureau makes the argument that the *Community of License*³⁵ decision has imposed Section 1.420(g) requirements to downgrade proposals.³⁶ However, in that proceeding, the Commission only decided to require nonadjacent upgrade and downgrade modifications to be done by rule making. The Commission said nothing about subjecting lower class modifications to the opportunity for competing expressions of interests. If that were the Commission's intent, it would certainly have offered some analysis and reasoning to reverse more than 20 years of consistently approving nonadjacent downgrades without other expressions of interest. In fact, the Commission expressly stated that "[w]e take this action to preserve the facility improvement options now set forth at Section 1.420(g)(1) and (2)." (emphasis added). Since the Commission has always referred to higher class channels as improvements under this rule and has never referred to lower class channels as improvements under this rule, it is unreasonable for the Bureau to make the assumption that the rule applies to downgrades. Thus, none of the conclusions, reasons or bases for the Bureau's interpretation of Section 1.420(g) justify applying the rule to lower class nonadjacent modifications proposals.³⁷

³⁴ See Section 0.283(c) of the Commission's Rules.

³⁵ *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services ("Community of License")*, 21 FCC Rcd 14212 (2006).

³⁶ Water Mill at para. 17.

³⁷ It is worth noting that had the Bureau issued a Public Notice soliciting other expressions of interest in the proposed Channel 277A at Noyack, Station WSUF could have been modified to that channel since, as had been previously established, Channel 233A was available as an additional channel at the transmitter site provided in SHU's initial filing for the other interested parties.

19. Here, WSUF currently operates on Ch. 210B1 with a directional antenna and is horizontally polarized to protect Ch. 6, Station WLNE, New Bedford, Massachusetts.³⁸ As a result of this protection and due to the small amount of land area, WSUF's coverage is less than a full Class A signal would provide to this portion of Long Island despite its Class B1 designation. In addition to the Ch. 6 preclusion, the reserved portion of the FM band is unavailable and the allotment of Ch. *277A at Noyack, New York will provide a second NCE signal to 23,654 population which is 22.9% of the 60 dBu population total of 103,430.

20. SHU previously cited authority for the modification of WSUF's license from the noncommercial educational band to the commercial band on a reserved channel.³⁹ Clearly it is in the public interest to consider the allotment of Ch. *277A to Noyack, New York.

21. The public interest would be served by providing a second NCE service to this portion of Long Island with 23,654 persons in an area of 135 sq. km. In addition, by moving from Ch. 210B1 to Ch. *277A, SHU can reach 26,812 more persons (a 189% increase) in an area with 269 more sq. km (a 143% increase) within its 70 dBu contour and 33,549 more persons (a 48.8% increase) in an area of 314 sq. km (a 49.2% increase) within its 60 dBu contour. These benefits will exist even after the Channel 6 station moves to another channel early next year.

22. Thus, the Commission should act consistently with past precedent and the public interest and grant the proposal to allot Ch. *277A to Noyack, NY and modify the license for Station WSUF, accordingly.

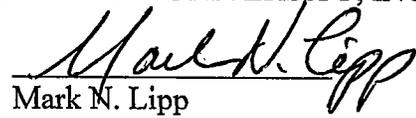
³⁸ The directional antenna restricts WSUF's signal to the west. The Ch. 6 protection causes the station to operate with 1.9 kW ERP horizontal at 109 meters HAAT. As a result, most of the remaining signal is wasted over water.

³⁹ SHU's Counterproposal at p.4. *See e.g. Siloam Springs, Arkansas*, 2 FCC Rcd 7485 (1989) *aff'd* 4 FCC Rcd 4920 (1989); *Bulls Gap, Tennessee*, 10 FCC Rcd 10444 (1995); *cf. Rosendale, New York*, 10 FCC Rcd 11471 (1995); *recons. denied*, 11 FCC Rcd 3607 (1996); *review denied*, 13 FCC Rcd 20590 (1998).

Respectfully Submitted,

SACRED HEART UNIVERSITY, INC.

By:



Mark N. Lipp
Scott Woodworth
Wiley Rein LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7503

Its Counsel

October 9, 2008

CERTIFICATE OF SERVICE

I, Randy Pannell, in the law firm of Wiley Rein LLP, do hereby certify that I have on this 9th day of October, 2008, caused to be mailed by first class mail, postage prepaid, copies of the foregoing "**Application for Review**" to the following:

Andrew J. Rhodes*
Media Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Isabel Sepulveda, Inc.
9 Lake Side Drive
Southampton, NY 11968

John Crigler
Garvey Schubert Barer
1000 Potomac Street, NW
Fifth Floor, Flour Mill Building
Washington, DC 20007
(*Counsel to Monroe Board of Education*)

*Via Hand Delivery



Randy Pannell

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