

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In re:

Amendment of Section 73.622(i)
Table of Allotments
DTV Broadcast Stations
Kalispell, Montana

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MB Docket No. ____

FILED/ACCEPTED

To: The Secretary, FCC
Attn: Chief, Allocations Branch
Policy and Rules Division
Media Bureau

DEC 21 2010

Federal Communications Commission
Office of the Secretary

PETITION FOR RULEMAKING

Montana State University ("MSU"), by its counsel and pursuant to Section 1.420 of the Commission's Rules, hereby petitions the Commission to institute a rulemaking proceeding to amend Section 73.622(i) of its Rules to add the allotment of Channel *46 at Kalispell, Montana, to the Post-Transition Table of DTV Allotments, transitioning the Kalispell allocation already listed in the Pre-Transition Table to the Post-Transition Table. In 2004, the Commission allotted Channel *46 to Kalispell to the Pre-Transition Table of DTV Allotments¹ and issued a *Public Notice* soliciting applications for a new noncommercial station.² In response to the *Public*

¹ Amendment of Section 73.622(b), Table of Allotments, Digital Television Broad. Stations (Kalispell, Montana.), *Report and Order*, 19 FCC Rcd 23149 (MB 2004). The Pre-Transition Table of DTV Allotments remains listed in Section 73.622(b) of the Commission's rules, and the Channel *46 Kalispell allotment properly is included therein.

² Filing Window for New Digital Non-Comm. Educ. Reserved Channel Television Station for Channel *46 at Kalispell, Montana.; Channel *21 at Great Falls, Montana; and Channel *16 at Billings, Montana, *Public Notice*, 21 FCC Rcd 7183 (MB 2006) ("*Public Notice*").

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Notice, MSU filed a construction permit application (the “Kalispell Application”).³ A competing application, however, also was filed, and a settlement agreement designating the Kalispell Application as the surviving application was not reached until last year after the conclusion of the DTV transition.

MSU accordingly is submitting this Petition to add the Pre-Transition Table’s Channel *46 Kalispell allotment to the Post-Transition Table, clearing the way for MSU to provide the city of Kalispell with its first local noncommercial educational broadcast television service. As explained herein, grant of this Petition and the Kalispell Application would serve the public interest by eliminating a substantial noncommercial white area in northwest Montana of over 140,000 people.⁴ Upon grant, MSU commits to completing construction promptly and bringing its high-quality educational programming to viewers in Kalispell and surrounding areas. Specifically, the Post-Transition Table of DTV Allotments would be amended as follows:

	<u>Present</u>	<u>Proposed</u>
Kalispell, Montana	9	9, <u>*46</u>

For the convenience of the Commission, the proposed parameters are provided:

Facility ID	State and City		DTV					
			Ch	ERP kW	HAAT (m)	RCAMSL (m)	Latitude (DDMMSS)	Longitude (DDDMMSS)
169027	MT	Kalispell	*46	186	830	2083	480048	1142155

³ See FCC File No. BNPED-20060909AJQ.

⁴ 47 U.S.C. § 396(a)(9) (“It is in the public interest for the Federal Government to ensure that *all* citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies.”) (emphasis added). Details of the proposed service are provided in *Petition for Rulemaking*, Montana State University, MB Dkt. No. 04-283 (submitted Mar. 24, 2004), incorporated herein by reference.

Background

MSU is a public institution of higher education in the state of Montana. It was founded as a land-grant college in 1893. MSU's home campus is located in Bozeman, Montana, which serves as the community of license to MSU's flagship noncommercial educational television station KUSM-TV. MSU also maintains three affiliate campuses located in the state, including MSU-Billings, MSU-Northern and MSU College of Technology-Great Falls. MSU's stated mission is to provide a challenging and richly diverse learning environment in which the entire university community is fully engaged in supporting student success; to provide an environment that promotes the exploration, discovery, and dissemination of new knowledge; to provide a collegial environment for faculty and students in which discovery and learning are closely integrated and highly valued; and to serve the people and communities of Montana by sharing its expertise and collaborating with others to improve the lives and prosperity of Montanans.

In furtherance of its educational mission, MSU proudly operates television station KUSM-TV and its Montana PBS network to broadcast high-quality educational, informational and cultural programming – including children's programming, locally-produced programming, and PBS offerings. Since 1984, MSU has been providing public broadcast service.

Beginning in 2004, MSU sought to expand noncommercial broadcast service to underserved areas in Montana, and, as part of those efforts, filed a Petition for Rulemaking to add a digital television allotment in Kalispell. The Commission in response concluded that the allotment would serve the public interest and promptly added it to the Pre-Transition Table of DTV Allotments.⁵ When the Commission opened a window for the new station, MSU and

⁵ Amendment of Section 73.622(b), Table of Allotments, Digital Television Broad. Stations (Kalispell, Mt.), *Report and Order*, 19 FCC Rcd at 23149.

another party filed competing applications. The parties last year resolved the conflict between their competing applications and submitted a Joint Request for Approval of Settlement Agreement proposing grant of the Kalispell Application and dismissal of the other,⁶ but this did not occur until after the completion of the DTV transition and implementation of the Post-Transition Table of DTV Allotments.

The fact that the Commission could not grant the Kalispell Application before the end of the DTV transition means that the Kalispell allotment will have to be added to the Post-Transition Table. Under its articulated policy, the Commission transferred to the Post-Transition Table only those allotments in the Pre-Transition Table for which it already had issued associated construction permits or licenses.⁷ Because the Kalispell Application was pending in 2007, the Commission did not transfer the Channel *46 Kalispell allotment from the Pre-Transition Table to the Post-Transition Table. With settlement now in place and the Kalispell Application now ripe for grant, the allotment may be transferred to the Post-Transition Table.

I. THE ALLOTMENT OF CHANNEL *46 TO KALISPELL, MONTANA SATISFIES TECHNICAL AND REGULATORY REQUIREMENTS.

MSU proposes that the Commission add to the Post-Transition Table a duplicate of the Kalispell Channel *46 allotment listed in the Pre-Transition Table. The Commission already has determined that a DTV allotment on Channel *46 at this site satisfies the minimum geographic spacing requirements with regard to all other DTV stations and DTV allotments and that it

⁶ Flathead Adventist Radio Network, Inc. & Bd. of Regents of the Mt. Univ. Sys., *Joint Request for Approval of Settlement Agreement*, FCC File Nos. BNPEDT-20060809AJQ, BNPEDT-20060810ABD (filed Sept. 18, 2009).

⁷ Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, *Report and Order*, 19 FCC Rcd 18279, ¶ 66 (2004).

complies with the community coverage requirements of Section 73.625(a).⁸ Adding this same allotment to the Post-Transition Table accordingly complies with the requirements of Section 73.616(b) of the Commission's Rules. Canada already has approved this precise allotment, so further international coordination should be unnecessary.⁹ As detailed in MSU's initial 2004 Petition for Rulemaking, one hundred percent of the 143,020 persons within the proposed service area do not receive any over-the-air noncommercial educational TV service.¹⁰

II. TRANSFERRING THE CHANNEL *46 ALLOTMENT TO THE POST-TRANSITION TABLE WOULD PROVIDE KALISPELL WITH A VALUABLE SOURCE OF NONCOMMERCIAL EDUCATIONAL PROGRAMMING.

At present, there is no noncommercial educational DTV station serving Kalispell, Montana. In 2004, the Commission intended for the DTV Channel *46 allotment to become the community's first and only noncommercial educational digital television facility, but this intention has gone unfulfilled as the Commission could not grant the Kalispell Application before the end of the DTV transition while a competing application was lodged against it. After the Commission adds the Kalispell allotment to the Post-Transition Table and grants the Kalispell Application, MSU intends to construct the new facilities promptly and bring its high-quality mix of local and PBS programming to these rural and unserved areas.¹¹

⁸ *Kalispell, Mt.*, 19 FCC Rcd at 23149.

⁹ See Letter from Chairman K. Martin, FCC, to K. Lindsey, *Industry Canada*, Agreement Between the Government of the United States of America and the Government of Canada, Aug. 5, 2008, Table B.

¹⁰ See *Petition for Rulemaking*, Montana State University, MB Dkt. No. 04-283 (submitted Mar. 24, 2004).

¹¹ MSU has obtained a commitment from the Corporation for Public Broadcasting to help fund the construction of the Kalispell facilities, but that commitment expires at the year's end. The Corporation for Public Broadcasting has expressed its willingness to extend that commitment into 2011, subject to Commission action.

Montana was the very last state to have its own PBS member station when MSU's flagship station KUSM-TV launched in 1984. Since then, its state-wide network of PBS member stations has grown slowly but steadily. Despite its geographic size, until the last year when MSU stations KBGS-TV and KUGF(TV) signed on, Montana could claim only two PBS member stations. The vast majority of the state still does not receive over-the-air public TV service.

The Communications Act supports Commission action to fill this noncommercial void in Montana:

It is in the public interest for the Federal Government to ensure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies.¹²

Grant of this Petition and the Kalispell Application would help to achieve that goal. The proposed facilities would provide first noncommercial service to Kalispell and to one hundred percent of the population within the proposed service area, accordingly eliminating a substantial noncommercial white area in furtherance of Congress's intent.

MSU is committed to providing the type of high quality, local programming that the Commission has long expected from noncommercial, educational stations. *See, e.g., Educational TV Assignment at Terre Haute, Indiana*, 19 RR 2d 1850, 1853 (1970) ("We have repeatedly announced our policy to forward local programming in the broadcast services. Local programming is essential particularly in the field of education in that local programming can most effectively deal with the specific problems, needs, and interests in the community being served."). MSU currently broadcasts several critically acclaimed, locally-produced programs

¹² 47 U.S.C. § 396(a)(9).

focused on local Montana issues in addition to PBS programs and children's programming.¹³

The Kalispell station will allow MSU to expand this service to even more residents.

III. BECAUSE THE CHANNEL *46 KALISPELL ALLOTMENT IS APPROVED AND ALREADY PRESENT IN THE PRE-TRANSITION TABLE, IT IS NOT A "NEW" ALLOTMENT REQUIRING A FREEZE WAIVER.

The Commission may grant MSU's request to duplicate the Channel *46 Kalispell allotment in the Post-Transition Table without waiver of its freeze on new DTV allotments.¹⁴

This Kalispell allotment is not new – the Commission already approved it.¹⁵ The allotment already exists in the Pre-Transition Table, and it may be transferred to the Post-Transition Table without waiver – just as was done for other broadcast television stations.

To the extent that the Commission concludes that a waiver of the freeze on new allotments nonetheless is needed here, such a waiver would be justified. Waiver is appropriate when grant of the proposal does not undermine the purpose of the underlying rule and strict adherence to the rule would not serve the public interest.¹⁶ The Commission imposed the instant allotment filing freeze to preserve the status quo, allowing the agency to create a Post-Transition Table using a "stable television database" without disruptive allotment changes.¹⁷ Transitioning

¹³ See, e.g., <http://www.montanapbs.org/Montana/>

¹⁴ *Freeze on the Filing of Certain TV and DTV Requests for Allotment or Service Area Changes, Public Notice*, 19 FCC Rcd 14810 (MB 2004) ("*Freeze Notice*").

¹⁵ See Amendment of Section 73.622(b), Table of Allotments, Digital Television Broad. Stations (Kalispell, Montana.), *Report and Order*, 19 FCC Rcd 23149 (MB 2004).

¹⁶ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

¹⁷ *Freeze Notice* at 2.

the Kalispell allotment to the Post-Transition Table would have no effect on this effort and thus would not undermine the freeze's purpose nor prejudice any other party.¹⁸

A waiver, if necessary, would serve the public interest. The Commission already has declared that providing new noncommercial educational television service in Kalispell is in the public interest.¹⁹ The Commission furthermore has indicated that it will waive the allotment freeze to pursue a Congressional mandate.²⁰ Here, a waiver would further the Congressional mandate in Section 396(a)(9) of the Communications Act "to ensure that all citizens of the United States have access to public telecommunications services." Currently, a substantial noncommercial white area exists in rural northwest Montana and grant of this Petition would eliminate it. Moreover, the Commission's longstanding policy favoring the activation of vacant NCE allotments warrants grant of waiver.²¹ Accordingly, if the Commission concludes that a freeze waiver is necessary, it would be justified for these many reasons.

¹⁸ MSU wishes to note that grant of the petition should not compromise any of the Commission's goals set forth in its National Broadband Plan. (*See* National Broadband Plan, released Mar. 16, 2010). Kalispell is located far from major markets and is terrain shielded in large part by the Rocky Mountains. It is almost 400 miles from the closest top-fifty market (Seattle, Washington). It is more than 325 miles from Boise, Idaho and 435 miles from Portland, Oregon. Denver, Colorado is almost 750 miles south.

¹⁹ *Kalispell, Mt.*, 19 FCC Rcd at 23149.

²⁰ In both *Atlantic City, New Jersey* and *Seaford, Delaware*, the Commission recently waived the filing freeze to allot two new DTV channels to advance the allocation policies of Section 331(a) of the Communications Act. *See* Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments, Television Broad. Stations (Atlantic City, N.J.), *Report and Order*, 25 FCC Rcd 2606 (2010); Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments, Television Broad. Stations (Seaford, Del.), *Report and Order*, 25 FCC Rcd 4466 (2010).

²¹ *See e.g., Montrose and Scranton, Pennsylvania*, 68 RR2d 702 (1990).

IV. THE KALISPELL DTV CHANNEL *46 ALLOTMENT MUST MAINTAIN ITS NONCOMMERCIAL, EDUCATIONAL DESIGNATION

To ensure that Kalispell retains its sole noncommercial educational service, the Commission must maintain DTV Channel *46's noncommercial educational designation. Reservation of Channel *46 for noncommercial educational use would make possible the enhanced provision of noncommercial and educational programs in the area. Moreover, in accordance with the requirements of Section 73.622(a), the proposed allotment would provide a first noncommercial educational service to 143,020 persons.

It should be noted that denial of this Petition effectively would delete the sole noncommercial allotment in northwest Montana, which would stand in stark contrasts to decades of Commission precedent. Commission policy clearly mandates the preservation of educational channels for their intended use, and the Commission is reluctant to delete a reserved channel.²² Even when the reserved channel is not in use, the Commission has refused to delete the allotment.²³ When the Commission assigns a television channel on a reserved basis, it intends for the channel to serve not only the present needs for noncommercial educational service, but future demands for the service as well.²⁴

Conclusion

For all of these reasons, MSU requests that the Commission institute a rulemaking proceeding to transition the DTV Channel *46, Kalispell allotment in the Post-Transition Table

²² See, e.g., *Television Channel Assignments*, 60 RR2d 784 (1986).

²³ *Ogden, Utah*, 42 Fed. Reg. 40302 (1977).

²⁴ See *Mansfield and Marion, Ohio*, 48 RR2d 1003 (1980).

of DTV Allotments in Section 73.622(i) of its Rules and to maintain this allotment's designation for noncommercial educational use.

Respectfully submitted,

MONTANA STATE UNIVERSITY

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December 21, 2010



Declaration Under Penalty Of Perjury

I, Eric Hyyppa, hereby declare under penalty of perjury that the foregoing statements set forth in this Petition for Rulemaking proposing an amendment to Section 73.622(i) of the Commission's Rules are true and correct to the best of my knowledge and belief.

By: 

Title: Director and General Manager

Date: 12/20/2010

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December 2010, I caused a copy of the foregoing Petition to be served on the following by U.S. mail, postage prepaid:

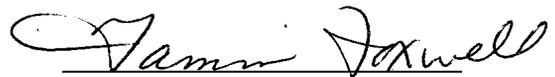
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