

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
)
Amendment of Section 73.606(b),) MB Docket No. 04-289
Table of Allotments,) RM-10802¹
Television Broadcast Stations, and)
Section 73.622(b), Table of Allotments)
Digital Television Broadcast Stations)
(Columbia and Edenton, North Carolina)
)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 30, 2004

Released: August 6, 2004

Comment Date: September 27, 2004

Reply Comment Date: October 12, 2004

By the Chief, Video Division:

1. The Commission has before it a petition for rule making filed by the University of North Carolina ("petitioner"), licensee of non-commercial television station WUND-TV, channel *2, and paired DTV channel *20, Columbia, North Carolina (collectively "WUND"). Petitioner requests the reallocation of channel *2 and DTV channel *20 to Edenton, North Carolina, as the community's first local TV service and the modification of station WUND's authorizations to specify Edenton as the community of license.²

2. Petitioner seeks to invoke the provisions set forth in Section 1.420(i) of the Commission's Rules, which permit the modification of a station's license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. This procedure is limited to situations in which the new allotment would be mutually exclusive with the existing allotment; the reallocation will result in a preferential arrangement of allotments

¹ In the *Notice of Proposed Rule Making* in MM Docket No. 03-224 (Knoxville, Tennessee), 18 FCC Rcd 22061 (2003), the rule making number was incorrectly identified as RM-10802 in lieu of RM-10801.

² Hampton Roads Educational Telecommunications Association, Inc., licensee of noncommercial educational station WHRO-TV, Hampton-Norfolk, Virginia, filed Opposition to Petition for Rule Making. We will not consider Hampton Roads ETA's opposition, as Section 1.405 of the Commission's Rules does not contemplate the filing of comments to petitions for rule making to amend the Television Table of Allotment prior to the issuance of a Notice of Proposed Rule Making. Hampton Roads ETA's opposition is hereby dismissed.

applying the Commission's television allotment priorities;³ and, the change would not deprive a community of its sole existing broadcast station.⁴

3. In support of its request, petitioner states that its proposal to change its community of license to Edenton is mutually exclusive with its existing authorization at Columbia. Petitioner states that it does not propose to relocate the transmitter site for WUND, thus there would no change in the area or population served by the station with its over-the-air signals. In applying the allotment priorities, petitioner contends that this request implicates priority 5, public interest factors; and, arguably priority 2, providing each community with at least one television broadcast station.

4. Petitioner describes Columbia and Edenton as communities located in the Albemarle Sound region of North Carolina and Virginia. It submits that the entire Albemarle Sound region is one single community, from a cultural and commercial perspective, encompassing not only the Albemarle Sound region, but also the sparsely populated areas of the northeastern corner of North Carolina and the southeaster corner of Virginia. Petitioner claims that while Columbia and Edenton, as the seats of their respective counties, each possess the indicia of "community" for allotment purposes, they are towns that are components of the larger community encompassing the northeastern region of North Carolina and the southeastern region of Virginia. As such, petitioner argues that its proposal to change its community of license from Columbia to Edenton is not a proposal to change to a new community within the meaning of Section 307(b) of the Communications Act. It cites *Bessemer and Tuscaloosa, Alabama*, in Report and Order, 5 FCC Rcd 669 (1990), noting that the Commission has generally recognized that television is a regional service, and therefore has employed an expanded definition of "community" in television "assignment" cases. Also citing *Winter Park Communications, Inc. vs. F.C.C.*, 873 F.2d 347, 351 (1989), petitioner argues that the term "communities", as used in Section 307(b) of the Communications Act is not limited in meaning, but may include metropolitan areas. Petitioner states that UNC-TV's network transmitters broadcast television programs simultaneously; allowing viewers in all part of the state see the programs at the same time, 24 hours a day, and seven days a week. In North Carolina, according to petitioner, UNC-TV is unique in its ability to knit citizens of a large, diverse State into a single community. Petitioner claims that under the broad definition of "community" as used in Section 307(b) of the Communications Act, Columbia and Edenton are component parts of the same community. For this reason, petitioner argues that the second and third requirements to change a station's community of license are satisfied because there is no "new"

³ The television allotment priorities are as follows: (1) to provide at least one television service to all parts of the United States; (2) to provide each community with at least one television broadcast station; (3) to provide a choice of at least two television services to all parts of the United States; (4) to provide each community with at least two television stations; and, (5) assign any remaining channels to communities based on population, geographic location, and the number of reception television services available to the community. See *Sixth Report and Order on Television Allocations*, 41 F.C.C. 148 (1952).

⁴ See *Modification of FM and TV Authorization to Specify a New Community of License* ("Change of Community R&O"), 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990), ("Change of Community MO&O").

community and no “deprived” community in WUND’s proposal.

5. Petitioner also states that the public interest would be served even if WUND’s proposal represents a change to a new community since its adoption would result in a net increase of viewers who want to receive WUND by satellite in the Norfolk-Portsmouth-Newport News DMA (“the Tidewater Market”). Petitioner states that grant of its proposal would allow WUND to avail itself of carriage on DBS in the Tidewater Market, the market which encompasses Edenton and Northeastern North Carolina as well as southeastern Virginia, but which excludes Columbia, North Carolina. Petitioner claims that grant of its new proposal will benefit thousands of satellite viewers who are currently in WUND’s Grade B contour or beyond who want to receive a higher quality signal by satellite. Petitioner also advises that Columbia is a very small town, submitting that the population according to the 1990 Census was 836 persons and, according to the 2000 Census, are now 819 persons. By comparison, Edenton is substantially larger with 1990 Census population of 5,268 persons, and a 2000 Census population of 5,394 persons. Petitioner argues that these population figures are evidence that a change of community of license to Edenton would serve allotment priority 5 since a larger population would receive its first transmission service. Petitioner believes that the Commission’s concern for a community’s loss of its sole existing transmission service is unaffected by this proposal because WUND’s request is merely an administrative change. However, petitioner requests, if the Commission deems necessary, a waiver of the Commission’s prohibition on the removal of an existing station representing a community’s sole local broadcast service. In this regard, petitioner cites the *Change of Community MO&O*, noting that one factor the Commission might consider in such a waiver request is the proposed provision of first reception service to a significantly sized population. Although the reallotment would not provide first reception to any population, petitioner reports that it would provide a first transmission service to Edenton, North Carolina, a town some 6 ½ times the size of Columbia.

6. Based on the information before us, we do not believe that the petitioner has demonstrated that its proposal would result in a preferential arrangement of allotments. While it is true that the reallotment of WUND’s channels to Edenton would provide the community with its local transmission service, it will be at the expense of Columbia, a community that would lose its sole existing transmission service. As pointed out by petitioner, the Commission will entertain requests to waive the prohibition on the removal of a local service, however, we find that petitioner’s reliance on population gains attributed to UNC-TV’s carriage on DBS in the Norfolk-Portsmouth-Newport News DMA, a subscriber service, is too speculative to be considered. See *Memorandum Opinion and Order on Remand*, MM Docket No. 93-191 (Pueblo, Colorado), FCC 99-162 (released July 7, 1999) and *Change of Community MO&O*. Therefore, we request that petitioner submit an analysis of the television transmission services licensed to the serve the “Tidewater Market”, as well as the television reception services and population figures currently receiving these services. In addition, we request an analysis of the television reception services currently received in the communities of Edenton and Columbia, North Carolina.

7. We believe the public interest would served by soliciting comments on this proposal since it could provide Edenton with its first local video transmission service, if granted. We also propose

to modify petitioner's authorization for station WUND to specify Edenton as its community of license. In compliance with Section 1.420(i), we will not accept competing expressions of interest in the use of television channels *2 and *20 at Edenton. TV channel *2 and DTV channel *20 can be allotted to Edenton in compliance with the Commission's minimum distance separation requirements at Station WUND's current licensed transmitter site. The coordinates for channels *2 and *20 at Edenton are 35-54-00 N. and 76-20-45 W.

8. Accordingly, we seek comments on the proposed amendment of the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, for the community listed below, to read as follows:

<u>City</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
Columbia, North Carolina	*2	--
Edenton, North Carolina	--	*2

9. Accordingly, we seek comments on the proposed amendment of the DTV Table of Allotments, Section 73.622(b) of the Commission's Rules, for the community listed below, to read as follows:

<u>City</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
Columbia, North Carolina	*20	--
Edenton, North Carolina	--	*20

10. The Commission's authority to institute rule-making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

11. Interested parties may file comments on or before September 27, 2004, and reply comments on or before October 12, 2004 and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

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 Brooks, Pierce, McLendon, Humphrey & Leonard, LLP
 P.O. Box 1800
 Raleigh, North Carolina 27602
 (Counsel for the University of North Carolina)

12. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b). See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981. The Regulatory Flexibility Act of 1980 would also not apply to rule making proceedings to amend the DTV Table of Allotments, Section 73.622(b) of the Commission's Rules.

13. For further information concerning this proceeding, contact Pam Blumenthal, Media Bureau, (202) 418-1600. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Division
Media Bureau

Attachment: Appendix

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the DTV Table of Allotments, Section 73.622(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off protection. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules).

(b) With respect to petitions for rule making which conflict with the proposals in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.). The Commission permits the electronic filing of all pleadings and comments in proceeding involving petitions for rule making (*except in broadcast allotment proceedings*). See Electronic Filing of Documents in Rule Making Proceedings, GC Docket No. 97-113 (rel. April 6, 1998). Filings by paper can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal

Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Vistronix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Center (Room CY-A257) at its headquarters, 445 12th Street, S.W., Washington, D.C.