

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

In the Matter of)
)
Amendment of Section 73.202(b),) MM Docket No. 93-17
Table of Allotments,) RM-8170
FM Broadcast Stations.)
(Rosendale, New York))

**MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)**

Adopted: June 23, 1997

Released: July 2, 1997

By the Commission:

1. The Commission has before it an Application for Review filed by the State University of New York ("SUNY") directed to the Memorandum Opinion and Order in this proceeding, 11 FCC Rcd 3607 (1996). Aritaur Communications, Inc. ("Aritaur") and Sacred Heart University, Inc. ("Sacred Heart") filed Oppositions to the Application for Review.¹ WMHT Educational Telecommunications filed a "Statement in Support of Application for Review." SUNY filed a Reply directed to the Aritaur Opposition. Aritaur filed a Reply directed to the "Statement in Support of Application for Review" and a Motion to Strike directed to the SUNY Reply. For the reasons discussed below, we deny the Application for Review.

Background

2. At the request of SUNY, licensee of noncommercial educational Station WFNP, Channel *204A, Rosendale, New York, the Notice of Proposed Rule Making, 8 FCC Rcd 947

¹The Sacred Heart Opposition was untimely by nearly six weeks. In a Motion to Accept Opposition, Sacred Heart notes that SUNY served it with a copy of the Application for Review at its former address and that the Application for Review has not been put on Public Notice. Our Rules do not require Public Notice for an Application for Review. Furthermore, Sacred Heart did not make a diligent effort to file its Opposition within the prescribed 15-day period even though it received the Application for Review prior to the expiration of the 15-day period. In view of the above and the fact that the arguments set forth in the Opposition are already being considered in this proceeding, we deny the Motion to Accept Opposition and will not consider the Sacred Heart Opposition.

(1993), proposed the allotment of Channel 273A to Rosendale, and modification of the Station WFNP license to specify operation on Channel 273A. In the Notice, the staff stated that the Station WFNP license could be modified to a channel of the same class without providing an opportunity for competing expressions of interest. However, the staff noted that should another party express an interest in providing Rosendale with an additional local service, Channel 255A would be available for allotment. In the Notice, the staff also observed that SUNY had not requested that Channel 273A be reserved for noncommercial educational use. In this regard, the staff correctly stated that our policy does not permit the reservation of a commercial channel for noncommercial educational use except where channels in the reserved portion of the FM band (Channels 201 - 220) are not available due to TV Channel 6 interference or preclusion by a foreign allotment. For these reasons, the staff requested that SUNY provide information regarding the availability of channels in the noncommercial educational FM band and clarify whether it seeks to have Channel 273A allotted on a commercial or noncommercial educational basis.

3. In response to the Notice, SUNY filed comments reiterating its intention to apply for the channel, if allotted. SUNY also stated that it does not want Channel 273A reserved for noncommercial educational use even though it will continue to operate Station WFNP as a noncommercial educational station.

4. The Report and Order, 10 FCC Rcd 11471 (1995), did not modify the noncommercial educational license of Station WFNP to operate on Channel 273A. Instead, it allotted Channel 273A to Rosendale and opened a filing window.² In doing so, the staff recognized that in the Notice it had inadvertently proposed to modify a noncommercial educational license to an allotment in the commercial FM band. The staff determined that this would be contrary to Commission precedent of not assigning noncommercial educational FM stations to the commercial band in the absence of TV Channel 6 interference or preclusion by a foreign allotment. SUNY filed a Petition for Reconsideration directed to that Report and Order.

5. The Memorandum Opinion and Order in this proceeding denied that Petition for Reconsideration. In that decision, the staff determined that contrary to SUNY's contention, the Report and Order did not contravene Section 1.420(g) of the Commission's Rules regarding the modification of a commercial FM license through the rulemaking process.³ The staff reaffirmed

²SUNY is one of ten applicants for the Channel 273A allotment at Rosendale, New York. Two of the other nine applicants propose to operate Channel 273A as a noncommercial educational station. In regard to parties in this proceeding, Sacred Heart has filed an application proposing to operate Channel 273A as a noncommercial educational station while Aritaur has filed an application proposing a commercial service.

³In Modification of FM and TV Licenses, 56 RR2d 1253 (1984), we adopted the procedure which permits a commercial FM station to modify its license through a rulemaking proceeding to a nonadjacent commercial FM channel provided there is an equivalent commercial channel to

its determination that the proposed modification would have been inconsistent with our policy regarding assignment of a noncommercial educational FM station to the commercial band.

6. The Memorandum Opinion and Order recognized that Station WFNP currently operates on a shared-time basis with noncommercial educational Station WRHV, Channel *204A, Poughkeepsie, New York, and that permitting Station WFNP to operate on Channel 273A would permit Station WRHV to operate on a fulltime basis. Nevertheless, the staff did not find an overriding public interest benefit in modifying the Station WFNP license to a commercial channel. This finding was based upon the fact that such action would remove the only allotment reserved for noncommercial educational use at Rosendale, and that there was no assurance, beyond the present intention of SUNY, that Rosendale will continue to receive a local noncommercial educational service. Finally, the staff concluded that its earlier decision was distinguishable from an earlier decision in Sioux Falls, South Dakota, 51 FR 4169, February 3, 1986, in which the staff modified the license of noncommercial educational Station KCFS, Channel *211A, Sioux Falls, South Dakota, to specify operation on commercial Channel 261A.

7. In support of its Application for Review, SUNY again contends that the staff refusal to modify the Station WFNP license was inconsistent with Section 1.420(g) of the Rules and contrary to our policy of encouraging broadcast stations to upgrade their facilities. In addition, SUNY argues that the staff action conflicts with precedent and ignores the public interest benefits of modifying the Station WFNP license to an alternate channel. We will discuss each argument below.

Discussion

8. Section 1.420(g) of the Rules. SUNY essentially argues that the Commission must permit it to upgrade its channel pursuant to a rulemaking procedure provided in Section 1.420(g) of our Rules notwithstanding the fact that the upgrade it proposes directly contravenes the Commission's policy prohibiting noncommercial to commercial channel changes except under specific conditions not present in this case. We agree with the staff that SUNY's argument is unconvincing.

9. In Modification of FM and TV Licenses,⁴ we adopted the procedure which permits an FM station to modify its license through a rulemaking proceeding to a nonadjacent FM channel without subjecting the new channel to competing expressions of interest provided there is an equivalent channel to accommodate any expression of interest in the proposed FM channel. This procedure is now set forth in Section 1.420(g) of the Rules.⁵ In adopting this procedure, we

accommodate any expression of interest in the proposed FM channel. This procedure is now set forth in Section 1.420(g) of the Rules.

⁴See n. 3, supra.

⁵In its Reply, SUNY discusses the applicability of Section 1.420(g) to its proposal. The

specifically stated, in response to a suggestion contained in comments from the law firm of Dempsey and Koplovitz, that a "switch" of a noncommercial educational channel and a commercial channel was outside the scope of that proceeding.

10. According to SUNY, the reference in Section 1.420(g) to "an FM station" is clear and unambiguous and does not distinguish between commercial and noncommercial educational FM channels. With respect to the suggestion contained in the Dempsey and Koplovitz comments, SUNY contends that our determination that the suggestion was outside the scope of the proceeding was "clearly dictum" in that Modification of FM and TV Licenses did not adequately explain the suggestion and its inapplicability to the procedure proposed in that proceeding.

11. The staff decision not to modify the license of noncommercial educational Station WFNP to a channel in the commercial band did not contravene Section 1.420(g) of the Rules. The SUNY argument concerning the applicability of Section 1.420(g) fails for two reasons. First of all, Modification of FM and TV Licenses was specifically intended to provide a rulemaking procedure to amend a Table of Allotments. This was clearly stated in Modification of FM and TV Licenses and its earlier Notice of Proposed Rule Making.⁶ Noncommercial educational FM channels are not assigned on the basis of a petition for rule making and an FM Table of Allotments. Rather, noncommercial educational FM stations are assigned by application on the basis of prohibited signal contour overlap.⁷ The statement in Modification of FM and TV Licenses that a procedure to modify a noncommercial educational license was outside the scope of the proceeding clarified the underlying proposal to create a procedure to amend licenses assigned to the Table of Allotments and, therefore, cannot be characterized as "dictum." Second, the SUNY argument that its proposal complies with "clear and unambiguous" language of Section 1.420(g) is without merit. Under the general heading of "RULEMAKING PROCEEDINGS," Section 1.420 of the Rules is titled "Additional procedures in proceedings for amendment of the FM, TV or Air-Ground Table of Allotments." In Section 1.420(g), the dual reference to "an FM station" and a "rulemaking proceeding" necessarily excludes noncommercial educational FM stations which are assigned by application.

Aritaur Motion to Strike is directed to this aspect of the SUNY proposal. In order that we may resolve all issues concerning Section 1.420(g) on the basis of a complete record, we hereby deny the Motion to Strike.

⁶48 FR 55585, December 14, 1983.

⁷See Section 73.509 of the Rules. The limited exceptions to assigning noncommercial educational FM stations on the basis of prohibited overlap involve separation requirements contained in international agreements and the fact that the noncommercial educational channels (Channels 218, 219 and 220) adjacent to the commercial portion of the FM band (Channels 221 through 300) must meet the applicable commercial separation requirements set forth in Section 73.207 of the Rules. See Section 73.507(a) of the Rules.

12. Sioux Falls, South Dakota. SUNY again argues that the staff decision in this proceeding conflicts with the earlier decision in Sioux Falls, South Dakota, 51 FR 4169, February 3, 1986, in which the staff modified the license of a noncommercial educational FM station to a commercial FM channel without reserving it for noncommercial educational use. Inasmuch as Sioux Falls was adopted after Modification of FM and TV Licenses, SUNY argues that the failure to discuss Section 1.420(g) in Sioux Falls supports its conclusion that there is no distinction between modifying a commercial and noncommercial educational license. We disagree.

13. In Sioux Falls, the staff modified the license of noncommercial educational FM Station KCFS, Channel *211A, Sioux Falls, South Dakota, to specify operation on commercial Channel 261A. In allotting Channel 261A to Sioux Falls, the staff did not reserve it for noncommercial educational use. The nonreservation of Channel 261A was premised on the facts that there were already four local noncommercial educational stations in Sioux Falls, that other commercial channels were available to Sioux Falls, and that the Notice of Proposed Rule Making in that proceeding had solicited specific comment on not reserving Channel 261A for noncommercial educational use. 50 FR 25430, June 19, 1985. In that action, the staff also noted that the modification to Channel 261A was necessary to correct its earlier misinterpretation of an application submitted by this licensee for Channel *215A in Sioux Falls. In this regard, Sioux Falls College, licensee of Station KCFS had filed an application for a new noncommercial educational station on Channel *215A in Sioux Falls (File No. BPED-840110AO). The staff inadvertently granted this application as a modification of the Station KCFS license on Channel *211. Thereafter, the staff deleted Channel *211. Subsequently, Great Plains Educational Trust filed an application for a new station on Channel *211 and this application was given cut-off protection on September 24, 1984. In order to rectify this situation in light of the fact that there were no noncommercial educational FM channels available in Sioux Falls, the Notice of Proposed Rule Making in Sioux Falls proposed a modification of license to Channel 261A.

14. These facts illustrate at least three decisionally significant distinctions between Sioux Falls and the present case. First of all, the proceeding in Sioux Falls was undertaken to correct a staff error and restore a Class A FM channel to Sioux Falls College. No such error has occurred in regard to Rosendale, New York. Second, the staff in Sioux Falls provided clear notice to the public and requested specific comment on a proposed modification of the Station KCFS license to a commercial channel. In doing so, the staff noted that there were already four noncommercial educational FM stations licensed to Sioux Falls and other commercial channels were available to accommodate any party wishing to operate a commercial FM station in Sioux Falls. In contrast, the Notice in this proceeding merely noted that SUNY had not requested that Channel 273A be reserved for noncommercial educational use. It then restated our policy of not permitting the reservation of channels in the commercial band for noncommercial educational use except where channels in the noncommercial educational band are not available due to TV Channel 6 interference or preclusion by a foreign allotment. Therefore, the Notice requested that SUNY provide information regarding the availability of channels in the noncommercial educational band and "clarify" whether it seeks to have Channel 273A allotted on a commercial

or noncommercial educational basis.⁸ We do not believe that this request for clarification was adequate notice to the public that we would modify the license of Station WFNP to the commercial FM band as a commercial station. Third, the situations in Sioux Falls and Rosendale are distinguishable in that there were four noncommercial educational FM stations licensed to Sioux Falls, while Station WFNP represents the only noncommercial educational FM station licensed to Rosendale.

15. Other Public Interest Matters. Station WFNP currently operates on a shared-time basis with noncommercial educational Station WRHV, Channel *204A, Poughkeepsie, New York. We recognize that modification of the Station WFNP license to another channel would provide a public interest benefit by enabling both stations to provide a fulltime noncommercial educational service.⁹ However, in response to the Notice, SUNY stated that it did not want Channel 273A reserved for noncommercial educational use. As such, there is no assurance, beyond the present intention of SUNY, that Rosendale will continue to have a local noncommercial educational service. We emphasize that the SUNY proposal would have removed the only allotment reserved for noncommercial educational use at Rosendale. Under these circumstances, we do not see an overriding public interest benefit in modifying the Station WFNP license to a commercial allotment.

16. Accordingly, IT IS ORDERED, That the aforementioned Application for Review filed by the State University of New York IS DENIED.

17. IT IS FURTHER ORDERED, That the aforementioned Motion to Strike filed by Aritaur Communications, Inc., IS DENIED.

18. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

19. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 418-2177.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

⁸In response to the Notice, SUNY did not state that a noncommercial educational channel is unavailable due to Channel 6 interference or foreign preclusion. Rather, SUNY merely stated that it does not want Channel 273A reserved for noncommercial educational use even though it will continue to operate Station WFNP on a noncommercial educational basis.

⁹WMHT Educational Telecommunications, licensee of Station WRHV, filed a "Statement" noting this fact and the public interest benefits of having both stations operate on a fulltime basis.