

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

In the Matter of )  
)  
Amendment of Section 73.202(b), ) MM Docket No. 99-240  
Table of Allotments, ) RM-9503  
FM Broadcast Stations. )  
(Albemarle and Indian Trail, )  
North Carolina) )

**REPORT AND ORDER  
(Proceeding Terminated)**

**Adopted: July 11, 2001**

**Released: July 13, 2001**

By the Chief, Allocations Branch:

1. The Allocations Branch has before it the Notice of Proposed Rule Making, 14 FCC Rcd 10524 (1998) (“Notice”), issued in response to a petition for rule making filed by Susquehanna Radio Corp. (“Susquehanna”), licensee of Station WABZ(FM), Channel 265A, Albemarle, North Carolina, requesting the reallocation of Channel 265A to Indian Trail, North Carolina, as that community’s first local aural transmission service, and the modification of Station WABZ’s license to specify Indian Trail as its community of license. Comments were filed by Susquehanna; Monroe Broadcasting Company, Inc. (“Monroe”), the licensee of Station WIXE(AM), Monroe, North Carolina; and Capstar TX Limited Partnership (“Capstar”), the licensee of three FM radio stations which operate in the Charlotte, North Carolina radio market.<sup>1</sup> Susquehanna filed replies to the comments filed by Monroe and Capstar.<sup>2</sup> For the reasons stated below, we grant Susquehanna’s request to change its community of license to Indian Trail.

Short-Spacing Problem

2. Susquehanna filed its request to reallocate Channel 265A to Indian Trail, North Carolina pursuant to the provisions of Section 1.420(i) of the Commission’s rules, which permits the modification of a station’s authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest.<sup>3</sup> We agree with Susquehanna’s assertions that the reallocation will provide Indian

<sup>1</sup> Those stations are WLYT(FM), Hickory, North Carolina; WRFX(FM), Kannapolis, North Carolina; and WKKT(FM), Statesville, North Carolina.

<sup>2</sup> Susquehanna also filed a “Motion for Leave to Supplement Reply Comments” in which it requests that we accept a supplement to its reply comments consisting of a letter from the Town Manager of Indian Trail, North Carolina and a copy of the town’s brochure. This letter constitutes evidence in support of certain assertions made by Susquehanna in its Reply Comments. In the interest of obtaining a full record in this proceeding, we grant Susquehanna’s motion.

<sup>3</sup> See Modification of FM and TV Authorizations to Specify a New Community of License, 4 FCC Rcd 4870

Trail with its first local aural transmission service, will eliminate entirely two of three pre-1964 grandfathered short-spacings which affect Station WABZ's operation, and will substantially reduce the third short-spacing. Susquehanna currently operates a pre-1964 grandfathered facility at 3kW effective radiated power (ERP) and 61 meters in antenna height above average terrain (HAAT). The proposed allotment at Indian Trail, North Carolina will have facilities of 6kW (ERP) and 100 meters (HAAT). The proposed allotment will eliminate the current short-spacings with respect to Stations WHSL(FM), Channel 262C, at High Point, North Carolina (currently 21.35 kilometers) and WIFM(FM), Channel 265A, at Elkin, North Carolina (currently 6.88 kilometers). The current short-spacing to Station WKXU (FM), Channel 266C at Burlington, North Carolina, would be reduced from 72.54 kilometers to 28.1 kilometers. Further, the reallocation of Channel 265A to Indian Trail will enable Station WABZ to increase the population it serves from its present 79,959 persons to 437,240 persons, for a net population gain of 357,281 persons. As stated in our Notice, the Commission has traditionally considered the elimination and/or reduction of long-standing short-spacings to be a matter of great importance.<sup>4</sup> In addition, our engineering staff has determined that the relocation of the station's transmitter site will not adversely affect any population that now receives interference-free service. Moreover, the populations within both the gain and loss areas resulting from the reallocation of Channel 265A from Albemarle to Indian Trail are well served with at least five aural services.

3. Traditionally, the Commission's policy is not to grant waivers of the spacing requirements in considering the allotment of an FM channel. See, e.g., Chester and Wedgefield, South Carolina ("Chester"), 5 FCC Rcd 5572 (1990), petition for review denied, No. 90-1496 (D.C.Cir. June 6, 1991). However, in Newnan and Peachtree City, Georgia, 7 FCC Rcd 6307 (1992) ("Newnan"), we made a limited exception to this policy. There, we reallocated Channel 244A from Newnan to Peachtree City, Georgia, and modified the license of Station WMKJ(FM) accordingly. Station WMKJ was a pre-1964 "grandfathered" facility under Section 73.213 of the Commission's Rules and did not meet the current spacing requirements set forth in Section 73.207(b) of the rules. The proposal in Newnan did not involve any change in the technical facilities of Station WMKJ. In taking that action, we recognized that we were creating a new short-spaced allotment in contravention of Section 73.207(b) of the Rules. Our rationale for that action was that "grandfathered" FM stations were in compliance with the Rules when authorized and should be afforded the same opportunity to change their community of license as other stations authorized in conformity with the Rules. In Newnan, we stated that we would consider waiving the strict application of Section 73.207 in limited circumstances, provided that no new short spacings are created, no existing short spacings are exacerbated, and the potential for interference between the currently short spaced stations is not increased. Recently, we reaffirmed our view that pre-1964 grandfathered short-spacing is permissible at the allotment stage in the very limited situation described in Newnan. See Oceanside and Encinitas, California, 14 FCC Rcd 15302 (1999) and Berlin and Conway, New Hampshire, 14 FCC Rcd 15307 (1999). In Fremont and Holton, Missouri ("Fremont"), 14 FCC Rcd 17108 (1999), we extended the policy of Newnan to pre-1989 Class A FM stations that do not comply with the separation requirements for Class A stations under

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(1990), recon. granted in part, 5 FCC Rcd 7094 (1990) ("Community of License").

<sup>4</sup> See the cases cited in paragraph 3 of our Notice.

our 1989 rules, but do comply as fully spaced 3 kilowatt stations under our rules prior to 1989. In Fremont, we allowed Station WSHN-FM to change its community of license from Fremont to Holton, Missouri, but this change did not involve any change in the transmitter site or power of Station WSHN-FM, and thus no new or additional short-spacing was created.

4. More recently, in Killeen and Cedar Park, Texas (“Killeen”), 15 FCC Rcd 1945 (2000), we allowed Station KLNC(FM) to change its community of license from Killeen, Texas, to Cedar Park, Texas. No technical changes were proposed for the station in question. Station KLNC was short-spaced to a pre-1964 grandfathered station as well as three other stations that had been granted pursuant to Section 73.215 of the Commission’s Rules. Station KLNC did not create the short-spacing to the three stations authorized to operate on a short-spaced basis to KLNC under Section 73.215. Those three stations are providing contour protection to Station KLNC as if it were a fully-spaced station. In these circumstances, we decided that where no transmitter site change or other technical changes were proposed and KLNC did not propose to utilize contour protection for any station and where no new short-spacing would be created and no existing short-spacing would be exacerbated, that Station KLNC should be afforded the same opportunity to change its community of license as the pre-1964 and the pre-1989 short-spaced stations mentioned above. See also: Kankakee and Park Forest, Illinois, DA 01-700, released March 23, 2001.

5. In brief, we have allowed stations that have been grandfathered as short-spaced to continue that short-spacing in situations where a station wishes to reallocate its channel to another community of license without changing its transmitter site or technical facilities. The case before us involves significant changes in transmitter site, effective radiated power, and antenna height. Unlike the cases discussed in paragraphs 3-4, supra, the case before us does not involve maintenance of the status quo of an existing facility, while changing the identity of its community of license. The move of Station WABZ(FM) from Albemarle to Indian Trail, North Carolina, constitutes a significantly new allotment designed to greatly increase the facilities and the audience of Station WABZ.

6. In spite of Station WABZ’s proposed change in transmitter site, we believe that the public interest benefits of Susquehanna’s request to change its community of license are compelling and warrant a waiver of Section 73.207 of the Commission’s Rules under the facts of this particular case. These benefits are the complete elimination of two pre-1964 grandfathered short spacings of 21.35 kilometers to Station WHSC(FM), Channel 262C, High Point, North Carolina, and of 6.88 kilometers to Station WIFM(FM), Channel 265A, Elkin, North Carolina. In addition, the proposed reallocation and change of transmitter site would significantly reduce a third short-spacing to Station WKXU(FM), Channel 266C, Burlington, North Carolina, from 72.54 kilometers to 28.1 kilometers. These short-spacings were the result of a generic change to the Commission’s spacing rules and were permitted to exist because the stations involved were in compliance with the spacing and other technical rules in effect at that the time of the rule change. In cases such as Newnan and Oceanside and Encinitas, California, we allowed pre-1964, grandfathered stations to change their community of license without changing their transmitter sites because they did not create any new short-spacings or exacerbate any existing short-spacings. We believe that a similar result is warranted here where no new short-spacings are created by the change in transmitter site and existing grandfathered short-spacings are eliminated or significantly reduced. Our view is

further buttressed by the fact that Susquehanna's reallocation proposal will provide Indian Trail with its first local aural transmission service and will enable Station WABZ to increase the population it serves from its present 79,959 persons to 437,240 persons.

7. In permitting this short-spacing, we are not making a generic determination that any pre-1964, grandfathered short-spaced station may change its community of license and transmitter site. Rather, as stated above, we are recognizing that the public interest benefits in this particular case are compelling, and we would necessarily review future proposals on a case-by-case basis. However, unlike pre-1964 grandfathered, short-spaced stations, we believe that other short-spacings caused by the use of contour protection or directional antennas under Section 73.215 of the Commission's Rules should be treated differently because they are the result of a voluntary decision by stations to move to short-spaced sites and provide contour protection. Such short-spacings are permitted at the application, but not the allotment, stage as part of the Commission's careful balancing of the need to maintain the integrity of stations' signals with the need for increased flexibility in choosing transmitter sites. Such flexibility is not available to grandfathered, short-spaced stations under the Rules, and our decision is based upon this distinction.

#### First Local Service Arguments

8. The Notice in this proceeding observed that Susquehanna argues that the reallocation of Channel 265A from Albemarle (population 14,939)<sup>5</sup> to Indian Trail (population 1,942) is to be preferred under the Commission's allotment priorities because it would provide Indian Trail with its first local aural transmission service (priority 3) as opposed to a third local aural transmission service at Albemarle (priority 4).<sup>6</sup> Because Indian Trail is located within the Charlotte Urbanized Area, Susquehanna provided information to demonstrate that Indian Trail is independent of the urbanized area pursuant to the criteria set forth in Faye and Richard Tuck ("Tuck"), 3 FCC Rcd 5374 (1988) and warrants being considered as a first local aural transmission service under priority (3).<sup>7</sup> Those criteria include (1) signal population coverage; (2) the size and proximity of the suburban community to the central city; and (3) the interdependence or independence of the suburban community to the central city of the urbanized area. 3 FCC Rcd 7374 at 5377-78. In this regard, our studies indicate that the city of Charlotte, North Carolina, is located 23.9 kilometers (14.3 miles) northwest of Indian Trail, North Carolina. Charlotte is located in Mecklenburg County, while Indian Trail is located in the adjacent county of Union, North Carolina. The facilities proposed by Susquehanna at Indian Trail would place a 70 dBu contour over 18.5 percent of the Charlotte Urbanized Area, while the 60 dBu contour would encompass 63 percent of the Charlotte Urbanized Area. As stated previously, the reallocation of Channel 265A to Indian Trail would enable Station WABZ to increase the population

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<sup>5</sup> Population figures are taken from the 1990 U.S. Census.

<sup>6</sup> The FM allotment priorities are: (1) first fulltime reception service; (2) second fulltime reception service; (3) first local service; and (4) other public interest matters. Priorities (2) and (3) are given equal weight. See Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (1982).

<sup>7</sup> See also Huntington Broadcasting Co. v. FCC ("Huntington"), 192 F.2d 33 (D.C. Cir. 1951).

it serves from its present 79,959 persons to 437,240 persons, for a net population gain of 357,281 persons.

9. Although Capstar TX Limited Partnership (“Capstar”) does not dispute the claim that Indian Trail is qualified as a “community” to which an FM channel can be allotted pursuant to Section 307(b) of the Communications Act of 1934, as amended (“the Act”), it argues that Indian Trail is not sufficiently independent from the Charlotte Urbanized Area to allow Susquehanna to receive credit for providing a first local service to Indian Trail. Rather, Capstar argues that Susquehanna would merely be providing an additional service to Charlotte. The Tuck case set forth eight factors to consider in determining whether a suburban community is independent of a metropolitan area. Susquehanna has provided information concerning each of these factors. Capstar has filed comments on certain factors to which Susquehanna has filed reply comments. For the reasons discussed below, we conclude that our review of the eight Tuck factors warrants a finding that Indian Trail is independent of Charlotte. We shall list each factor and discuss the opposing pleadings concerning each factor.

(a) The extent to which the community residents work in the larger metropolitan area rather than the specified community. Susquehanna states that the 1990 U.S. Census asserts that 11.3% of the employment age (16 years and older) residents of Indian Trail work in the community itself, 22.2% work in Union County (including Indian Trail), and 46.5% work in Charlotte. Capstar claims the Commission has found that population figures of less than 46.5% of employment age residents of a suburban community working in the central city of a metropolitan area suggest that a community is not sufficiently independent from the larger metropolitan area.<sup>8</sup> In response, Susquehanna argues that the Commission has relied on a majority of the eight Tuck factors with a heavier emphasis on certain of those factors, and the percentage of residents working in their own community has not been a significant factor in past cases. We agree with Capstar that the fact that 46.5% of employment age residents of Indian Trail work in Charlotte is significant. Nevertheless, we concur with Susquehanna that this fact is not dispositive in this case, because the community of Indian Trail is independent of Charlotte under the other Tuck factors. See, e.g., Malvern and Bryant, Arkansas, 14 FCC Rcd 3576 (Alloc. Br. 1999).

(b) Whether the smaller community has its own newspaper or other media that covers the community’s local needs and interests. Susquehanna states that Indian Trail does not have its own local newspaper, but that the town is served by the Monroe Enquirer Journal, which is published Tuesday through Sunday. Susquehanna observes that, according to an employee of the paper, subscribers are primarily located in Union County and the paper does not focus on Charlotte events. In its reply comments, it also claims that residents of Indian Trail read the Union County Sentinel, which has its office in Indian Trail.<sup>9</sup> It notes that Indian Trail has its own Internet web page that

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<sup>8</sup> Capstar cites, inter alia, RKO General, Inc., 5 FCC Rcd 3222 (1990). Capstar claims that, in that case, the fact that only 35.1% of Richmond, California residents worked in that community favored a finding that Richmond was not independent of San Francisco.

<sup>9</sup> Susquehanna observes that the Union Observer is a supplement to the Charlotte Observer and focuses on Union County and Indian Trail events. It asserts that Indian Trail should receive credit for the Union Observer just as Chesapeake, Virginia received credit for a supplement inserted in the Norfolk, Virginia daily newspaper

includes information about the community and provides a means for local businesses to advertise. Further, it states that residents of Indian Trail obtain cable television through Cablevision of Monroe, which does not provide service to Charlotte. Thus, it appears that Indian Trail has one daily newspaper, one cable television outlet, and one internet web site available to cover the local needs and interests of Indian Trail.

(c) Whether community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area. Capstar notes that Susquehanna does not mention the perceptions of Indian Trail's community leaders and residents concerning the issue of that community's independence from Charlotte. Susquehanna argues that this factor has been of relatively minor significance, citing Bay St. Louis and Poplarville, Mississippi ("Bay St. Louis"), 10 FCC Rcd 13144 (Alloc. Br. 1995) as a case finding that a community was independent of a larger metropolitan area without presenting any showing regarding community leaders' perceptions. In a supplement to its reply comments, Susquehanna provides a letter from the Town Manager of Indian Trail, North Carolina stating that, based on his experience, the residents of Indian Trail consider their town to be a vibrant, growing, and self-sustaining community that offers its residents access to all of the government services, commercial establishments, and cultural activities of an independent community. Susquehanna has also provided a description and overview of Indian Trail and its incorporation and development as part of its Petition for Rule Making. In short, the record is replete with objective evidence of Indian Trail's independence from Charlotte. Subjective perceptions of community leaders and residents are merely one means of demonstrating the independence of a particular community.

(d) Whether the specified community has its own local government and elected officials. Capstar concedes that Indian Trail has its own local government and elected officials.

(e) Whether the smaller community has its own telephone book provided by the local telephone company or zip code. Indian Trail has a post office and zip code. Susquehanna asserts that the Indian Trail business and residential telephone directory is published by Alltel and included in the same telephone book as the Charlotte business and residential listings. Nevertheless, the listings for Charlotte are in a separate section. Although Capstar notes that Indian Trail does not have a separate telephone book, this matter has had very little significance in past cases. See, e.g., Bay St. Louis and Elizabeth City, supra.

(f) Whether the community has its own commercial establishments, health facilities and transportation systems. Capstar concedes that Indian Trail has commercial establishments and health facilities bearing the Indian Trail name. We observe that Indian Trail has numerous commercial establishments, community activities, churches, and civic organizations.

(g) The extent to which the community and central city are part of the same advertising market. Susquehanna claims that local businesses can advertise in the Monroe Enquirer Journal, the Indian Trail web page, and the Monroe cable system. Capstar argues that Susquehanna has not provided information on the extent to which Indian Trail businesses actually advertise on Charlotte

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in Elizabeth City, North Carolina and Chesapeake, Virginia ("Elizabeth City"), 9 FCC Rcd 3586 (Alloc. Br. 1994).

media rather than these “local” media. Susquehanna claims that this Tuck factor (g) has had little significance in Commission cases, citing, *inter alia*, Bay St. Louis, *supra*. Although no special showing has been made concerning the extent to which Indian Trail and Charlotte are part of the same advertising market, it appears that at least some advertising directed at Indian Trail residents is likely to occur in local media, as opposed to Charlotte media.

(h) The extent to which the specified community relies on the larger metropolitan area for various municipal services, such as police, fire protection, schools, and libraries. Susquehanna states that Indian Trail has a library that is a branch of the Union County Library System and that the public elementary, middle and high schools in Indian Trail are part of the Union County Public School District. It also explains that Indian Trail contracts with the Union County Sheriff’s Department for police service and that Indian Trail receives fire protection services from three different volunteer fire departments located in communities in Union County. Further, Susquehanna asserts that Indian Trail provides planning and zoning services and residential garbage collection to the town’s residents. Capstar alleges that since certain services are provided by Union County and “agencies elsewhere within the county,” that Indian Trail “relies on the larger metropolitan area” for these services. This statement is true insofar as it states that Union County provides certain services, but Charlotte does not provide services to Indian Trail. In this regard, most of Union County is not contained in the Charlotte Urbanized Area.

10. In light of the evidence described in paragraphs 8 and 9 of this Report and Order, we conclude that Indian Trail, although located within the Charlotte Urbanized Area, should be treated as a separate and distinct community and should not be credited with transmission services licensed to Charlotte.

11. Monroe Broadcasting Company, Inc. (“Monroe Broadcasting”), licensee of Station WIXE(AM), Monroe, North Carolina, filed comments in opposition to this rulemaking. Monroe argues that Indian Trail should not be a preferred community under Section 307(b) of the Act, because it is highly dependent upon or interdependent with the city of Monroe, the county seat of Union County. In this light, Monroe Broadcasting argues that the proposed reallocation should be considered as a fourth local service to the city of Monroe, not the first local service to Indian Trail.<sup>10</sup>

We disagree. Monroe Broadcasting has provided no basis to extend Huntington and Tuck in order to deny first local service to Indian Trail based upon either its proximity to or dependency upon Monroe. Cf. Beaufort County Broadcasting Co. v. FCC, 787 F.2d 645 (D.C. Cir. 1986). Here,

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<sup>10</sup> Monroe also claims that waiver of the distance separation requirements of Section 73.207 of the Rules to allow some continued short-spacing of Station WABZ would undermine the Commission’s policy rationale for allowing licensees to change their communities of license, citing the Report and Order in Community of License, 4 FCC Rcd 4870 at 4874, para. 27. In the referenced paragraph, the Commission stated that the application of the allotment priorities and policies, in conjunction with the Commission’s minimum distance separations requirements and the present intensive use of spectrum in urban areas, will act as a barrier to the clustering of stations in major metropolitan areas. However, we do not believe that our grant of a waiver of the spacing rules in this case will undermine the Commission’s policy concerns set forth in Community of License, because our action here will improve current spacings for Station WABZ and because Indian Trail complies with the Tuck test, which is designed to prevent the migration of stations to urbanized areas.

Monroe (population 16, 385) is too small to constitute an Urbanized Area as defined by the U.S. Census, and is not listed as such by the 1990 U.S. Census. Under these circumstances, there is no need for Susquehanna to demonstrate Indian Trail's independence from Monroe. Assuming that such a showing were necessary, we believe that the record evidence demonstrates Indian Trail's independence from Monroe as well as Charlotte.

12. Having made the foregoing decisions, we must determine whether Susquehanna's proposal would result in a preferential arrangement of allotments. To do so, we must compare the existing and proposed arrangements of allotments using the allotment priorities set forth in Revision of FM Assignment Policies and Procedures, supra at note 6. Since Indian Trail would receive its first local aural transmission service (priority 3), Susquehanna's proposal to serve Indian Trail is favored over the retention of the allotment at Albemarle (priority 4). Additionally, the reallocation will afford Susquehanna an opportunity to expand its service area, as set forth in paragraphs 2, 6, and 8, supra. Based upon the foregoing, we believe that the public interest would be served by reallocating Channel 265A from Albemarle to Indian Trail. Therefore, in accordance with the provisions of Section 1.420(i) of the Commission's Rules, we will modify the license of Station WABZ(FM) to specify operation on Channel 265A at Indian Trail, North Carolina.

13. As stated in the Notice, Channel 265A can be allotted to Indian Trail, North Carolina, in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules with a site restriction of 10 kilometers (6.2 miles) northeast of the community at coordinates 35-06-53 NL and 80-33-44 WL.

14. Accordingly, pursuant to the authority contained 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 ORDERED, That effective September 6, 2001, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

<u>Community</u>	<u>Channel Number</u>
Albemarle, North Carolina	-----
Indian Trail, North Carolina	265A

15. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Susquehanna Radio Corp. for Station WABZ(FM), Albemarle, North Carolina, IS MODIFIED to specify operation on Channel 265A at Indian Trail, North Carolina, subject to the following conditions:

(a) Within 90 days of the effective date of this Order, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Commission's Rules.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

16. Pursuant to Commission Rule Section 1.1104(l)(k) and (3)(m), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Susquehanna Radio Corp., licensee of Station WABZ(FM), is required to submit a rule making fee in addition to the fee required for the application to effect the change in community of license.

17. IT IS FURTHER ORDERED That this proceeding IS TERMINATED.

18. For further information concerning the above, contact R. Barthen Gorman, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos  
Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau