

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

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MB Docket No. 04-134
Table of Allotments,)	RM-10948
FM Broadcast Stations.)	
(Toquerville, Utah))	

**REPORT AND ORDER
(Proceeding Terminated)**

Adopted: January 16, 2008

Released: January 18, 2008

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it the *Notice of Proposed Rule Making*¹ issued at the request of Calvary Chapel of St. George ("Petitioner") proposing the reservation of vacant Channel 280C at Toquerville, Utah for noncommercial educational ("NCE") use. Petitioner filed Comments. Bonneville International Corporation ("Bonneville International") filed opposing Comments to which the Petitioner filed Reply Comments. Bonneville International filed a 'Motion to Accept Supplemental Comments' and 'Supplemental Comments' ("Supplemental Comments"). Petitioner filed an 'Opposition to Motion to Accept Supplemental Comments' and 'Motion to Strike' ("Motion to Strike"). In response, Bonneville International filed an 'Opposition to Motion to Strike' ("Opposition"). For the reason discussed below, we will not reserve vacant Channel 280C at Toquerville for NCE use.

2. **Background.** In the *Reexamination of the Comparative Standards for Noncommercial Educational Applicants* ("NCE Report and Order"), the Commission established revised criteria by which a rulemaking proponent may reserve an FM allotment for NCE use.² Under the expanded criteria, a proponent must demonstrate that it is technically precluded from using a reserved channel (Channels 201 through 220); and that the proposal would provide a first and/or second NCE radio service to at least ten percent of the population within the 1 mV/m (60 dBu) contour of the proposed station.³ Such population must exceed 2,000 persons.⁴

¹ *Toquerville, Utah*, 19 FCC Rcd 6953 (MB 2004) ("Notice").

² 15 FCC Rcd 7386 (2000). Previously, the Commission would only reserve a channel in the non-reserved FM band (Channels 221 through 300) if the petitioner demonstrated that no reserved channel could be used without causing prohibited interference to Channel 6 TV station(s) and to foreign allotments.

³ The Commission originally limited this expanded reservation criteria to future allotment proceedings. Thereafter, the Commission extended the expanded criteria to existing vacant FM allotments for which a *Notice of Proposed Rule Making* had been released prior to August 7, 2000, the effective date of the *NCE Report and Order*. See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants* ("NCE Second Report and Order"), 18 FCC Rcd 6691 (2003). In a *Public Notice* released September 30, 2003, we invited petitions for rule making to reserve these vacant FM allotments for NCE use pursuant to the *NCE Second Report and Order*. See *Media Bureau Opens Window to Permit Noncommercial Educational Reservation Showings for Certain Vacant FM Allotments*, 18 FCC Rcd 19600 (MB 2003) ("Public Notice"). In response to the *Public Notice*, Petitioner filed a timely petition for rulemaking, requesting the proposed NCE reservation of vacant Channel 280C at Toquerville.

⁴ See Section 73.202(a)(1)(ii).

3. The *Notice* provided an opportunity for an opposing party to file rebuttal comments identifying a site at which a reserved channel could be assigned with facilities fully equivalent to the proposed reserved allotment. Such an alternate reserved channel proposal also must satisfy the first and/or second NCE radio service criterion. Alternatively, a party may file comments demonstrating that the reservation proposal would not, in fact, provide a first and/or second NCE radio service to ten percent of the population within the 1 mV/m (60 dBu) contour of the proposed station. In response to the *Notice*, Petitioner filed comments, restating its interest in the NCE reservation of vacant Channel 280C at Toquerville, Utah.

4. Bonneville International filed Comments opposing the NCE reservation of Channel 280C at Toquerville. In its comments, Bonneville International asserts that reserved band Channel 201 is available at Toquerville. Booneville International also states that an equivalent Class C facilities could be authorized on Channel 201 at the city reference coordinates at Toquerville in compliance with Section 73.525 of the Commission's Rules (the "Rules").⁵ In this regard, Booneville International claims that such facilities would provide a first NCE service to 15.3 percent (19,962 persons).

5. Petitioner filed Reply Comments, stating that a Channel 201 facility at Toquerville would violate Section 73.525 of the Rules because the proposed NCE Class C facility would cause interference to a rulemaking petition proposing the reallocation of a Channel 6 TV facility from Ely to Caliente, Nevada.⁶ Petitioner also contends that Booneville International lacks standing to challenge the reservation showing.⁷

6. In response, Bonneville International states that the Rules do not require parties participating in rulemaking proceedings to demonstrate standing to file, nor did the *Notice* in this proceeding specify such requirement. However, Bonneville International indicates that it has an interest in applying for the Toquerville allotment for FM commercial purposes. Bonneville International filed Supplemental Comments addressing the interference showing submitted by the Petitioner. Bonneville International states that the Petitioner is relying on a rulemaking petition that is not afforded protection under the Rules and involves a construction permit that expired over two years ago. Moreover, Bonneville International claims that the Petitioner's engineering showing does not consider terrain factors. Bonneville International contends that Section 73.525(a) of the Rules requires that applications for new NCE facilities protect "authorized" Channel TV 6 stations. As such, Bonneville International claims that the reallocation proposal for the Caliente Channel 6 TV facility does not require protection. Bonneville International also states that even if protection were afforded, the expiration of the construction permit for the Ely Channel TV 6 facility renders the rulemaking proposal moot. Moreover, Bonneville International asserts that a full Class C Channel 201 facility at Toquerville would not cause potential interference to the proposed Caliente Channel 6 Station because the two communities are separated by mountains. Bonneville International submitted a Longley Rice study, demonstrating that the mountains would prevent any actual interference from a Channel 201 operation in Toquerville to hypothetical Caliente TV 6 viewers. As such, Bonneville International claims that a Caliente TV 6 facility would not conflict with a NCE FM authorization on a reserved channel at Toquerville.

7. Petitioner filed a Motion to Strike Bonneville International's Supplemental Comments because the pleadings are untimely and unauthorized. Petitioner argues that under Section 1.405 of the Rules, pleadings filed in response to a petition are limited to statements in support of or in opposition to the petition, and replies to those statements.⁸ In this regard, Petitioner contends that no additional

⁵ See 47 C.F.R. § 73.525.

⁶ See *Ely and Caliente, Nevada*, Notice of Proposed Rule Making, 16 FCC Rcd 20523. (MMB 2001).

⁷ Citing *FCC v Sanders Bros. Radio Station*, 309 U.S. 470, 476 (1940)

⁸ See 47 C.F.R. § 1.405(a)-(b).

pleadings may be filed unless specifically requested or authorized by the Commission. Therefore, Petitioner claims that Bonneville International's Supplemental Comments should be summarily dismissed without any consideration of their contents.

8. Bonneville International filed an Opposition, stating that the Petitioner's Motion to Strike has no merit and should be denied because the pleading was filed to address a new technical showing submitted by the Petitioner in its Reply Comments. In addition, Bonneville International argues that the Commission has discretion to accept additional pleadings to assure a complete record.

9. **Discussion.** Petitioner's argument that Bonneville International does not have standing to participate in the proceeding is not well taken. The *Notice* specifically requested public comment on the proposed NCE reservation and Bonneville International expressed an interest in applying for the vacant Channel 280C at Toquerville for commercial purposes. As previously noted, the *Notice* provided an opportunity for any opposing party to file rebuttal comments, identifying a site at which a reserved band channel could be assigned with facilities fully equivalent to the proposed reserved allotment. In order to fully resolve this issue, we will accept the Supplemental Comments filed by Bonneville International to establish a complete record in this proceeding.

10. A staff engineering study reveals that Channel 201C at Toquerville is short-spaced to the "tolled" construction permit for Station KBNY-TV6 at Ely, Nevada, and the TV 6 rulemaking reallocation proposal for Station KBNY-TV6 from Ely to Caliente, Nevada proposed in MM Docket No. 01-323.⁹ We agree with Bonneville International's contention that Section 73.525(a) of the Rules only requires that applications for new NCE facilities protect "authorized" TV Channel 6 stations and not pending TV 6 rule making proposals. In this instance, Channel 201C at Toquerville is available because the reserved band channel would not cause any potential interference to Station KBNY-TV6 at Ely since the 48 dbu contour of Channel 201C at Toquerville is outside of the Grade B contour for this operating Ely TV6 station.¹⁰ In contrast, a proposed Channel 201C at Toquerville would cause potential interference to 74,910 persons located within the Grade B contour of the proposed TV6 reallocation at Caliente. This exceeds the 3,000 person limit permitted under Section 73.525(c) of the Rules.¹¹ However, under subsection (a) Channel 201C at Toquerville is not required to protect this TV analog rulemaking reallocation proposal to Caliente, Nevada.¹² Based on the foregoing, we will not reserve vacant Channel 280C at Toquerville for NCE use. Accordingly, the aforementioned petition is dismissed.

11. The Commission will not send a copy of this *Report and Order* pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A), because the proposal was dismissed.

12. IT IS ORDERED, That the Petitioner's proposal to reserve Channel 280C at Toquerville for NCE use is DISMISSED.

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

⁹ See File Nos. BMPCT-20050811ACP. See also, *Ely and Caliente, Nevada*, Notice of Proposed Rule Making, 16 FCC Rcd 20523 (MMB 2001). The construction permit for TV Channel 6 Station KBNY at Ely was tolled to allow for the processing of the TV rulemaking proposal, MM Docket No. 01-323 for Station KBNY to Caliente, which is currently pending.

¹⁰ See 47 C.F.R. § 73.525(e) and 73.599.

¹¹ See 47 C.F.R. § 73.525(c).

¹² See 47 C.F.R. § 73.525(a).

14. For further information concerning this proceeding, contact Rolanda F. Smith, Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

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