

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

)	
In the Matter of)	
)	
Amendment of Section 73.622(i),)	MB Docket No. 11-139
Post-Transition Table of DTV Allotments,)	RM-11636
Television Broadcast Stations)	
(Hampton-Norfolk, Virginia; Norfolk, Virginia-)	
Elizabeth City, North Carolina))	

REPORT AND ORDER

(Proceeding Terminated)

Adopted: February 21, 2013

Released: February 22, 2013

By the Chief, Video Division, Media Bureau:

1. At the request of Hampton Roads Educational Telecommunications Association (HRETA), licensee of noncommercial educational television station WHRO-TV, channel *16, Hampton-Norfolk, Virginia, the Commission has before it a *Notice of Proposed Rulemaking*, seeking comment on HRETA's proposed reallocation of its channel *16 to Norfolk, Virginia-Elizabeth City, North Carolina, and to modify station WHRO-TV's license to specify Norfolk, Virginia-Elizabeth City, North Carolina as its community of license.¹ Charter Communications (Charter) and the University of North Carolina (UNC) filed comments, and HRETA filed a Reply. For the reasons discussed below, we deny HRETA's request to modify its community of license, and dismiss the Petition.

I. INTRODUCTION AND BACKGROUND

2. Section 307(b) of the Communications Act of 1934, as amended (the Act),² requires that station assignments be made to "communities."³ HRETA filed its reallocation proposal pursuant to Section 1.420(i) of the Commission's Rules,⁴ which permits 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.⁵ In considering a reallocation proposal, the Commission compares the existing allotment versus

¹ *Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments, Television Broadcast Stations (Hampton-Norfolk, Virginia; Norfolk, Virginia-Elizabeth City, North Carolina)*, Notice of Proposed Rulemaking, 26 FCC Rcd 11304 (MB 2011) (*Notice*).

² 47 U.S.C. § 307(b).

³ *In the Matter of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88, 101 (1982) (*Assignment Policies and Procedures*). See also *Mighty-Mac Broadcasting Co.*, Second Report and Order, 101 FCC 2d 303 (1985).

⁴ 47 C.F.R. § 1.420(i).

⁵ See *Modification of FM and TV Authorizations to Specify a New Community of License*, Report and Order, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990).

the proposed allotment to determine whether the reallocation will result in a preferential arrangement of allotments.⁶

3. In its rulemaking petition, HRETA asserts that this change will accomplish a preferential arrangement of allotments, consistent with the Commission's section 307(b) mandate to promote a fair, efficient and equitable distribution of service. HRETA represents that while Elizabeth City, North Carolina presently has no local television station, it has a population of 17,188, and is the center of the Elizabeth City Micropolitan Statistical Area, which has a population of 57,267 according to a 2004 Census estimate. Based on these and other representations regarding Elizabeth City's make-up, HRETA concludes that Elizabeth City deserves its own television station.⁷

4. HRETA further argues that reallocation would advance the Commission's allotment priorities by providing Elizabeth City with its first local television service, without violating any of the other priorities. HRETA also pledges that it will not abandon its long-standing obligation to meet the needs of Hampton, Virginia. HRETA states that Hampton is part of the Norfolk Metropolitan Area, that WHRO-TV will continue to be licensed to Norfolk, and that it will continue to consult with community leaders in Hampton as well as to ascertain the needs of that community and develop programming to meet those needs.

5. HRETA also submits that it satisfies the standard set forth in section 73.622 of the rules, which requires a petitioner for a change in location to demonstrate that it can provide the required city coverage to its new community of license. HRETA does not propose to relocate the transmitter site for WHRO-TV, nor is it proposing to operate on a different channel, and submits an engineering statement that concludes that the station already provides the requisite coverage to both Norfolk and Elizabeth City. HRETA notes that the predicted community contours of the station will remain the same and there will be no change in the area or population served by the station with its over-the-air signal. HRETA further states that the station's programming will not change except to the extent needed to serve the needs of Elizabeth City.

6. The Media Bureau issued the *Notice* on August 17, 2011, granting HRETA's request for a waiver of the Commission's freeze on the filing of petitions for rulemaking by television stations to change their community of license.⁸ The *Notice* explained that the section 1.420(i) modification procedure is limited to specific situations,⁹ and sought comment on the proposed amendment to section 73.622(i) of the Commission's rules, from Hampton-Norfolk, Virginia, to Norfolk, Virginia-Elizabeth

⁶ This determination is based upon the television allotment priorities set forth in *Amendment of Section 3.606 of the Commission's Rules and Regulations*, Sixth Report and Order, 41 F.C.C. 148, 167-173 (1952). The television allotment priorities are to: (1) provide at least one television service to all parts of the United States; (2) provide each community with at least one television broadcast station; (3) provide a choice of at least two television services to all parts of the United States; (4) provide each community with at least two television broadcast stations; and (5) assign any remaining channels to communities based on population, geographic location, and the number of television services available to the community from stations located in other communities.

⁷ Petition at 4. HRETA further states that Elizabeth City is home to two colleges, a branch of the University of North Carolina and a U.S. Coast Guard command. Elizabeth City is incorporated and has its own mayor and city council. Elizabeth City has its own newspaper, *The Daily Advance*, and two AM and three FM broadcast stations.

⁸ *Notice*, 26 FCC Rcd at 11304 (citing "Freeze on the Filing of Certain TV and DTV Requests for Allotment or Service Area Changes," Public Notice, 19 FCC Rcd 14810 (MB 2004)).

⁹ *Notice*, 26 FCC Rcd at 11305 (citing *Modification of FM and TV Authorization to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, Memorandum Opinion and Order, 5 FCC Rcd 7094 (1990)).

City, North Carolina.¹⁰ HRETA filed comments in support of its Petition, and Charter and UNC filed comments opposing the grant of the Petition.

7. In its comments, HRETA asserts that its proposed reallocation comports with all three components of the section 1.420(i) modification procedure. First, HRETA states that its proposal to change its community of license to Norfolk-Elizabeth City is mutually exclusive with its current authorization at Hampton-Norfolk because the predicted contours will remain the same. Second, according to HRETA, the proposed allotment at Elizabeth City would create a preferential arrangement of allotments. Third, WVEC-TV would continue to be licensed to Hampton, and therefore there would be no deprivation of the sole existing local station to any community.

8. Charter opposes the proposed community of license change as being contrary to established Commission policy and the public interest. Charter argues that HRETA has not made any showing that a hyphenated allotment is justified, and further asserts that Elizabeth City and Norfolk are two disparate and independent communities nearly 45 miles apart. Charter points to Commission precedent disfavoring the use of hyphenated allotments, and maintains that HRETA fails to meet the standard of a compelling showing that hyphenation is warranted. Specifically, Charter points to a previous notice of proposed rulemaking stating that the Commission refrains from making hyphenated allotments, and will do so “only where it appeared that the communities should be treated as one due to: (1) common interest and mutual economic, cultural, and social interdependence; (2) a showing that neither of the communities could alone support a station; or (3) in order to determine close questions of fact at the hearing stage.”¹¹ Charter asserts that the current proposal before the Commission fails because it does not involve a comparative hearing; Norfolk already has other television stations licensed to it; HRETA provides no basis whatsoever for employing a hyphenated allotment; and the demographic and other information available indicate that Norfolk and Elizabeth are independent.

9. Charter also asserts that the proposal is deficient because it would fail to bring any new service to the Elizabeth City community. Charter points to the Petition itself, which states that WHRO-TV’s site and facilities will not be improved, upgraded, or expanded in any way, and that HRETA has not identified any needs or community-specific programming. Charter alleges that the mission statement, annual report, web-site, and very call letters of WHRO-TV, as well as its dedication to the related communities of Norfolk and Hampton for the last 50 years, make it difficult to imagine HRETA undermining its Hampton Roads commitment for an independent city nearly 45 miles away.

10. Further, Charter points to the Commission’s recent denial of carriage to HRETA on Charter’s Manteo, North Carolina cable system, and suggests that HRETA’s true purpose for pursuing its flawed proposal is to gain mandatory carriage rights.¹² Charter argues that it would be perverse to permit a station to circumvent a Commission signal carriage order by manipulating the allotment table for the purpose of gaining mandatory carriage rights beyond those provided by the rules.

11. In its comments, UNC also argues that HRETA has not presented any evidence to establish that the hyphenation of Norfolk-Elizabeth City creates a viable community for allotment purposes. UNC advances three reasons why the proposal does not further the Commission’s allotment priorities. First, adopting such a reallocation would undermine the original basis of Hampton’s

¹⁰ The Federal Register published the *Notice* on August 31, 2011. 78 Fed. Reg. 54189 (2011).

¹¹ Charter Comments at 3 (citing *Section 73.606(b), Table of Allotments, Television Broadcast Stations (Bryan and College Station, Texas)*, Notice of Proposed Rule Making, 2 FCC Rcd 3420 (MMB 1987)).

¹² Charter Comments at 7 (citing *Complaint of Hampton Roads Educational Telecommunications Association, Inc., v. Charter Communications, Inc. for Carriage of WHRO-TV, Hampton-Norfolk, Virginia (Request for Section 403 Investigation)*, Memorandum Opinion and Order, 24 FCC Rcd 14390 (MB 2009)).

hyphenated authorization. According to UNC, in adopting the DTV Table of Allotments, the Commission summarily abandoned the use of hyphenated markets from its analog table, and only continues to recognize one compound allotment – the Hampton-Norfolk allotment that belongs to WHRO-TV.¹³ UNC argues that HRETA’s failure to request a waiver of the Commission’s policy to end the use of hyphenated markets in the DTV Table of Allotments warrants a dismissal of the Petition without further consideration.

12. Second, UNC argues that HRETA falls far short of meeting the high standard for hyphenating a market for allotment purposes. UNC points to prior cases where the Commission has established that petitioners seeking hyphenated allotments must make “a very compelling showing.”¹⁴ According to UNC, localism requires broadcast stations to serve, primarily, one community, and there is rarely a public interest benefit to permitting a station to choose from multiple locales. UNC charges that HRETA falls well short of a “compelling” showing to overcome the presumption against hyphenation, as it has made no showing and ignored the applicable decisions and governing standard. UNC cites to multiple Commission notices and orders setting forth the three hyphenation categories recognized by the Commission. For example, UNC points to the Commission’s decision to add Hampton and Newport News to the prior Norfolk-Portsmouth television allotment, but to reject adding Virginia Beach to the multi-hyphenated assignment market.¹⁵ UNC reasons that the Commission’s finding that Virginia Beach fails to have the requisite common social, cultural, trade and economic interests and Hampton and the rest of the cities in the community warrants a finding that Elizabeth City, North Carolina – which is even further away and on a different body of water – certainly does not have the necessary degree of interdependence with Norfolk.¹⁶

13. Third, UNC contends that in light of WHRO-TV’s core mission, granting the Petition would do nothing to provide service to Elizabeth City. UNC argues that HRETA’s owners are the Hampton Roads school districts, that HRETA’s bylaws and articles of incorporation expressly limit ownership in the licensee company to Virginia school districts, and that the Petition itself expressly states that HRETA will not abandon its longstanding obligation to meet the needs of Hampton, Virginia.¹⁷ UNC argues that “[n]o amount of posturing about addressing the needs of Elizabeth City can mask the fact that WHRO-TV’s principal mission will always be Hampton Roads.”¹⁸

14. In its Reply, HRETA responds to questions of hyphenation by stating that Norfolk and Elizabeth City are in the same Designated Market Area (DMA), and “that commonality of interest is decisively established by the fact that both communities are situated within the same DMA.” HRETA

¹³ UNC Comments at 7-8 (citing 47 C.F.R. § 73.622(i); *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Seventh Report and Order and Eighth Further Notice of Proposed Rulemaking, 22 FCC Rcd 15581, 15622, para. 101 (2007) (“The Commission did not use hyphenated markets in the initial DTV Table and did not use hyphenated markets in the new DTV Table proposed in the *Seventh Further Notice*.”) (footnote omitted)).

¹⁴ UNC Comments at 8 (citing *Amendment of Section 73.606(b), Table of Allotments, TV Broadcast Stations (Bryan and College Station, Texas)*, Report and Order, 3 FCC Rcd 2263 (MMB 1988)(*Bryan-College Station Order*)).

¹⁵ See UNC Comments at 10-22 (citing, among other cases, *Amendment of Section 73.606(b), Table of Assignments, Television Broadcast Stations (Hampton-Norfolk-Portsmouth-Newport News, Virginia)*, Report and Order, 53 Rad. Reg. 2d 53, 55 (1983); *Bryan-College Station Order* (rejecting proposal to hyphenate the proposed Bryan-College Station, Texas allotment market)).

¹⁶ UNC Comments at 12-14.

¹⁷ UNC Comments at 25-27 (citing Petition at 4).

¹⁸ UNC Comments at 27-28.

argues that the Commission dispositively relies upon Nielsen DMAs to define the market.¹⁹ HRETA further states the commenters' questioning of whether its programming will satisfy the needs of Elizabeth City is off-base, because the Commission has never required allotment proposals to do more than commit to ascertain the needs of the proposed community and agree to meet those needs. HRETA goes on to dismiss the relevance of the allotment hyphenation cases cited by UNC as being over 20 years old and dealing with brand new allotments, in contrast to the case before the Commission "where an existing, already hyphenated allotment, is simply being changed without leaving the DMA."²⁰

15. HRETA contends that UNC's broadcast station in Edenton, North Carolina is carried on Charter's cable systems serving the Outer Banks of North Carolina, and therefore the public interest will be served by granting HRETA's proposal by "leveling the playing field" and affording WHRO-TV the same access. In response to Charter's accusation that HRETA filed its petition in order to achieve carriage of the WHRO-TV's signal by Charter's systems in the Outer Banks, HRETA says that it "pleads guilty."²¹ HRETA explains that this goal does not detract from the good that would be accomplished by providing Elizabeth City with its first television service, and that if its community of license were changed, HRETA would have an absolute obligation to ascertain public needs in Elizabeth City and program accordingly.

II. DISCUSSION

16. We conclude that Norfolk, Virginia–Elizabeth City, North Carolina fails to qualify as a community for allotment purposes, and we dismiss the Petition. We find that HRETA has failed to make a compelling showing that a hyphenated allotment is warranted as required by Commission precedent.

17. We agree with UNC that before we analyze whether the proposed reallocation advances the Commission's priorities, we must first examine whether the proposed hyphenation of Elizabeth City and Norfolk qualifies as a community and a viable community of license. The Commission has a longstanding policy disfavoring hyphenation of allotments.²² Specifically, the Commission has held that petitioners must make a very compelling showing that the Commission should hyphenate,²³ which it advanced to an even greater degree by abandoning hyphenation in its adoption of the digital Table of Allotments. Therefore, consistent with our precedent to refrain generally from hyphenating markets, we will apply the Commission's established three-pronged test, and will hyphenate only where it appears that the communities should be treated as one due to: (1) common interest and mutual economic, cultural and social interdependence; (2) a showing that neither of the communities could alone support a station; or (3) in order to determine close questions of fact at the hearing stage.²⁴

18. We conclude that HRETA has not demonstrated that Norfolk and Elizabeth City should be treated as one community. Under the first prong, we determine based on the facts before us that we cannot conclude that Norfolk and Elizabeth City have sufficient common interest or interdependence to warrant

¹⁹ HRETA Reply at 3-4 (citing *KJLA, LLC*, Memorandum Opinion and Order, 26 FCC Rcd 12652 (MB 2011); *Amendment of Section 76.51 of the Commission's Rules to Include Merced and Porterville, California in the Fresno-Visalia-Hanford-Clovis Television Market*, Notice of Proposed Rule Making, 15 FCC Rcd 164 (CSB 2000) (*Merced-Fresno Carriage Order*)).

²⁰ HRETA Reply at 4-5.

²¹ HRETA Reply at 5.

²² See, e.g., *Amendment of Section 73.606(b), Table of Allotments, TV Broadcast Stations, (Los Angeles and Norwalk, California)*, Report and Order, 6 FCC Rcd 5317, 5318, para. 1 n.2 (MMB 1991).

²³ E.g., *Bryan-College Station Order*, 3 FCC Rcd at 2263, para. 2 (1988).

²⁴ *Id.*

hyphenation. Rather, the evidence of Elizabeth City's size, lack of proximity to Norfolk, and other information submitted by HRETA indicate independence from rather than interdependence with Norfolk. We find particularly relevant HRETA's representations that Elizabeth City is the center of the separate Elizabeth City Micropolitan Statistical Area with a population of 57,267 (2004 Census estimate); that it is fully incorporated with a mayor and city council; that it is home to the largest U.S. Coast Guard command in the nation; and that it has its own daily newspaper.

19. The Commission has rejected requests to hyphenate even where there has been some demonstration of municipal service commonality,²⁵ which exceeded the showing that HRETA has put forth here. HRETA's Petition, comments and reply do not provide any further evidence of commonality of interest, other than to state that both communities are situated within the same DMA,²⁶ which falls far short of the particularized and compelling showing necessary to prove interdependence.

20. We disagree with HRETA that the DMA contours independently and dispositively determine the geography of a community or otherwise axiomatically establish interdependence between communities within that DMA. A DMA is a Nielsen-defined television market consisting of a unique group of counties. The Commission has repeatedly made clear that local communities are not synonymous with DMAs, including its recent pronouncement in the *DTS Order* that the use of DMAs should not shift a station's primary focus from its community of license.²⁷

21. In particular, we find HRETA's reliance on the *Merced/Fresno Carriage Order* and related line of cable carriage decisions to be unpersuasive and of limited relevance. In these cases, the Commission considered amendment of section 76.51 of the Commission's rules, rather than the proposed amendment of section 73.622(i) currently before us. Section 76.51 enumerates the top 100 television markets and the designated communities of those markets pursuant to section 614 of the Communications Act, and is used to determine territorial exclusivity rights and cable carriage, among other issues.²⁸ In contrast, we examine here the appropriateness of a request to change a broadcaster's community of license, which is based on the bedrock responsibility of a licensee to serve the needs and interests of a particular community. Accordingly, we reject the notion that we are compelled to grant a hyphenation request simply because a broadcaster has the ability to identify any two municipalities within the same DMA.

22. HRETA also fails to meet the standards of the second and third prong of the test for identifying a viable Norfolk-Elizabeth City community. With respect to the second prong, because there are currently three television stations other than WHRO-TV licensed to Norfolk, we cannot conclude that

²⁵ For instance, even though the communities of Dry Ridge and Williamstown, Kentucky both received sheriff, hospital, library and ambulance service from Grant County, and Williamstown provided water service to Dry Ridge, and electricity to parts of Dry Ridge, they had independent schools and separate city governments. *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Moscow, Ohio; Paris, Wilmore, Morehead, Falmouth, Winchester, Carrollton, Elizabethtown, Dry Ridge, Somerset, and Williamstown, Kentucky)*, MM Docket No. 88-31, Report and Order 4 FCC Rcd 3441, 3443, paras. 19-20 (MMB 1988) (concluding that WKDJ's showing was insufficient to justify a hyphenated allotment, where the evidence submitted by WKDJ shows that Williamstown and Dry Ridge are separate and distinct communities, with divergent economic, social, and political interests).

²⁶ Reply at 3.

²⁷ *Digital Television Distributed Transmission System Technologies*, 23 FCC Rcd 16731, 16744-46 at paras. 20-25 (2008) (*DTS Order*) ("Broadcasters, however, are licensed to local communities, not DMAs, and for good reason. This ensures that broadcasters are responsive to the unique interests and needs of the individual communities to which they are licensed.").

²⁸ See, e.g., *Merced-Fresno Carriage Order*, 15 FCC Rcd at 1078, para. 2.

Norfolk is unable to support WHRO-TV on a stand-alone basis.²⁹ Finally, the situation before us does not implicate a competitive hearing.

III. ORDERING CLAUSES

23. IT IS ORDERED, That the Petition for Rulemaking filed by Hampton Roads Educational Telecommunications Association to change station WHRO-TV's community of license IS DENIED.

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

25. For further information concerning the proceeding listed above, contact Jeremy Miller, Media Bureau, (202) 418-1600.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Division
Media Bureau

²⁹ WPXV-TV, WTKR, and WTVZ-TV.