



Federal Communications Commission
Washington, D.C. 20554

February 20, 2024

Mountain Broadcasting Corporation
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Lerman Senter
2001 L Street, NW, Suite 400
Washington, D.C. 20036

Re: Petition For Rulemaking To
Change Community of License
WMBC-TV, Newton, New Jersey

Dear Petitioner/Licensee:

We have before us a Petition for Rulemaking filed by Mountain Broadcasting Corporation (Petitioner or MBC), the licensee of station WMBC-TV (Station or WMBC-TV), channel 18, Newton, New Jersey (Newton), requesting that the Video Division, Media Bureau (Bureau) amend the Table of TV Allotments to delete channel 18 at Newton and substitute channel 18 at West Caldwell, New Jersey (West Caldwell).¹ For the reasons set forth below, we conclude that the proposed community of license change from Newton to West Caldwell is inconsistent with the public interest because it would remove the only local television service licensed to Newton, which the Commission generally prohibits. Furthermore, a waiver of this general prohibition is not warranted based on the facts presented by the Petitioner.

Background. The Commission determines a preferential arrangement of allotments under section 307(b) of the Communications Act of 1934, as amended (Act),² based on the following five priorities: (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 broadcast stations; and (5) to 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.³ In considering actions on applications for licenses, modifications, and renewals, section 307(b) of the Act requires the Commission to “make such distribution . . . among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.”⁴

¹ Petition filed by Mountain Broadcasting Corporation on September 7, 2018 (Petition). See <https://www.fcc.gov/ecfs/document/1090712758507/1>. On April 13, 2017, the Commission completed the incentive auction and broadcast television spectrum repacking authorized by the Spectrum Act, and the post-incentive auction transition period ended on July 13, 2020. See *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auction*, GN Docket No. 12-268, Order, 36 FCC Rcd 15891, 15892, para. 4, n.13, and 15893, para. 6 (2021). At the time MBC filed its Petition, the Table of Allotments had yet to be updated to reflect the outcome of the incentive auction. The Commission has since adopted a new post-incentive auction Table of TV Allotments, 47 CFR § 73.622(j), and the Bureau will refer to the new rule in this letter decision.

² 47 U.S.C. § 307(b).

³ *Amendment of Section 3.606 of the Commission's Rules and Regulations*, Sixth Report and Order, 41 F.C.C. 148, 167, para. 63 (1952).

⁴ 47 U.S.C. § 307(b).

Section 1.420(i) of the Commission's rules (change of community rule) provides that during a rulemaking proceeding to amend the Table of TV Allotments, a licensee may seek to modify a station's license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest where the amended allotment would be mutually exclusive with the licensee's or permittee's present assignment.⁵ The Commission will apply this procedure in the limited circumstances where: (1) the new allotment will be mutually exclusive with a station's existing allotment; (2) the new allotment will result in a preferential arrangement of the allotments according to the Commission's television allotment priorities; and (3) the new allotment will not deprive a community of its sole local transmission outlet.⁶

When the Commission adopted the change of community rule, it first stated that it would not allow a change in community if it would "deprive a community of an existing service representing its only local transmission service."⁷ On reconsideration, the Commission stated that removal of a community's only television is presumptively inconsistent with the public interest, and clarified that it will only entertain a request to waive its general prohibition on the removal of a community's sole local service in "rare circumstances" where such a removal might serve the public interest, by, for example, providing a "first reception service to a significantly sized population."⁸ However, the Commission went on to emphasize that "a proposal which would reduce the number of communities enjoying local service is presumptively contrary to the public interest."⁹ The Commission also cautioned that it did not "intend to apply the first local service preference of our allotment criteria blindly"¹⁰ finding that an inflexible application could undermine the fair, equitable, and efficient distribution of radio services mandated by section 307(b) of the Act and potentially result in manipulation of the Commission's allotment priorities.¹¹ Even in rare circumstances where removal of a community's first service might provide a first reception service to a significantly sized population, the Commission has found that "special circumstances" must still exist to warrant the removal.¹²

Petition. On September 7, 2018, MBC filed a Petition pursuant to the change of community rule to delete channel 18 at Newton and substitute channel 18 at West Caldwell, and specify West Caldwell as WMBC-TV's community of license.¹³ This action would remove the sole channel allotted to Newton.

⁵ 47 CFR § 1.420(i); *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, MM Docket No. 88-526, Report and Order, 4 FCC Rcd 4870, 4873-74, paras. 22-8 (1989) (*Change in Community R&O*), recon. granted in part, 5 FCC Rcd 7094 (1990) (*Change in Community Recon. MO&O*).

⁶ *Change in Community R&O*, 4 FCC Rcd at 4873-74, para. 28; see also *Amendment of Section 73.622(i). Post-Transition Table of DTV Allotments Television Broadcast Stations (Peoria and Oswego, Illinois)*, MB Docket No. 21-54, Notice of Proposed Rulemaking, 36 FCC Rcd 1579, 1579-80, para. 2 (MB 2021).

⁷ *Change in Community R&O*, 4 FCC Rcd at 4873-74, para. 28.

⁸ *Change in Community Recon. MO&O*, 5 FCC Rcd at 7096, para. 17.

⁹ *Id.* at 7097, para. 18.

¹⁰ *Id.* at 7096, para. 13.

¹¹ See *id.* at para. 14.

¹² See *Amendment of Section 73.622(i), Digital Television Broadcast Stations (Block Island and Newport, Rhode Island)*, MB Docket No. 18-153, Report and Order, 33 FCC Rcd 8773, 8776, para. 7 (MB 2018) (*WPXQ-TV Order*) (internal citations omitted).

¹³ Petition at 1-2. See *supra* n.1.

As such, MBC acknowledges that its Petition does not comply with the Commission’s allotment policies and requests that the Bureau waive the general prohibition on the removal of a community’s sole local service and find that such removal would serve the public interest in order to provide the first local service to a different community.¹⁴ MBC does not propose any changes in WMBC-TV’s authorized facilities and will continue to provide a principal community coverage signal to both Newton and West Caldwell from its currently authorized transmission facilities. Therefore, it maintains that the proposed community of license change is mutually exclusive with WMBC-TV’s current allotment at Newton and meets the first criterion of the change of community rule.¹⁵

MBC goes on to argue that the proposal would result in a preferential arrangement of allotments according to the Commission’s television allotment priorities “because West Caldwell is a larger and more populous community than Newton and would result in West Caldwell obtaining its first locally licensed television...while not affecting television service and coverage for Newton.”¹⁶ At the time the Petition was filed, West Caldwell had a population of 10,759 and Newton had a population of 7,997,¹⁷ a difference of 2,762 persons.¹⁸ Finally, MBC asserts that the proposed new community of West Caldwell would better serve the public interest and is consistent with prior precedent where the Commission has granted petitions to change a station’s community of license by taking into consideration factors such as “whether the proposed new community is larger and more populous, its economic importance to the surrounding area, ties between the licensee and the desired community of license, and expressions of support from local citizens and officials.”¹⁹ MBC specifically compares its proposal to the circumstances in the *Ardmore/Sherman R&O*, which we discuss in greater detail below.²⁰

Finally, MBC enumerates various characteristics of the community of West Caldwell, including

¹⁴ See Petition at 3-4.

¹⁵ Petition at 2-3. When MBC filed its Petition, WMBC-TV operated as a Distributed Transmission Service facility, see 47 CFR § 73.626, with transmission facilities on the Empire State Building and at Montclair State University in New Jersey, near West Caldwell. MBC also had a pending application to construct a single antenna facility at One World Trade Center, which would continue to provide community coverage to Newton. That application has since been granted, and the facility has been constructed and licensed. See LMS File No. 0000197762, granted Aug. 18, 2022.

¹⁶ Petition at 5.

¹⁷ *Id.*

¹⁸ Since the Petition was filed, there has been only limited population growth. As of July 1, 2022, the most recent US Census Bureau population estimates, West Caldwell had an estimated population of 10,807 and Newton had an estimated population of 8,466. This is a difference of 2,341 persons. U.S. Census Bureau, QuickFacts, <https://www.census.gov/quickfacts/fact/table/westcaldwelltownshipessexcountynewjersey/PST045222> (last visited Feb. 12, 2024); U.S. Census Bureau, QuickFacts, <https://www.census.gov/quickfacts/fact/table/newtontownsussexcountynewjersey,westcaldwelltownshipessexcountynewjersey/PST045222> (last visited Feb. 12, 2024).

¹⁹ Petition at 3 and nn. 9-10, citing *Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations, (Ardmore, Oklahoma and Sherman, Texas)*, MM Docket No. 91-342, Report and Order, 7 FCC Rcd 4846 (1992) (*Ardmore/Sherman R&O*); *Amendment of Section 73.622(i), Digital Television Broadcast Stations (Block Island and Newport, Rhode Island)*, MB Docket No. 18-153, Notice of Proposed Rulemaking, 33 FCC Rcd 4879 (MB 2018) (*WPXQ-TV NPRM*); and *Amendment of Section 73.622(b), Table of Allotments, Digital Television Broadcast Stations (Columbia and Edenton, North Carolina)*, MB Docket No. 04-289, Report and Order, 20 FCC Rcd 12457 (MB 2005) (*WUND Order*).

²⁰ *Infra* p. 6.

its government, public safety departments, and educational entities,²¹ which it asserts justify a waiver and modification of its license to specify West Caldwell as the station's community of license. It also claims the station has strong community ties with West Caldwell as evidenced by the fact that its headquarters and studio facilities are located in West Caldwell,²² and that the Petitioner has received letters supporting its rulemaking petition from community leaders.²³ While MBC did not provide any information about the attributes of Newton, its current community of license, based on Bureau staff research, Newton is the county seat of Sussex County, New Jersey, a relatively rural area in the northern most part of New Jersey, bordering both Pennsylvania and New York.²⁴ Like West Caldwell, Newton also has its own government, public safety departments, and educational entities.²⁵

Discussion. We conclude that MBC's Petition does not warrant waiver of the Commission's policy against removing a sole local television transmission service.²⁶ The Commission has stated on repeated occasions that removal of a community's only television service is presumptively inconsistent

²¹ According to the Petition, West Caldwell is governed by a Mayor and six-member Borough Council, and has a municipal court and violations bureau. It also has public works, health, and public safety departments that include a 60 person volunteer fire department, a multi-department police force, first aid squad, and emergency management department. Petition at 5. West Caldwell shares a public school district with Caldwell Borough with more than 2,300 students, and is home to Essex County West Caldwell Tech, a regional public career technical high school with more than 250 students. *Id.* at 6. In addition, Caldwell University, a Catholic liberal arts university with approximately 2,200 students, is located in neighboring Caldwell. *Id.*

²² *Id.* at 9-11.

²³ *Id.* at 11-12 and Exhibit 4.

²⁴ A significant percentage of the area of Sussex County is either undeveloped or uninhabited, because it is part of the federal or New Jersey State park system assessed for agricultural use. *See, e.g.,* https://www.nps.gov/appa/planyourvisit/upload/APPA_Map.pdf (last visited Feb. 13, 2024); <https://www.sussexskylands.com/outdoors/parks-and-trails/> (last visited Feb. 13, 2024); <https://www.sussex.nj.us/documents/planning/farmland/2008/K.Sussex.Ch.5%20FINAL.pdf>. (last visited Feb. 13, 2024).

²⁵ Newton is governed by a Town Council which includes the Mayor, and the day-to-day management of Newton is overseen by a Town Manager. *See* <https://www.newtontownhall.com/103/Town-Council> (last visited Feb. 13, 2024). Newton has the typical array of public safety departments, including fire and police, and a regional medical center. *See* <https://newtonpolice.org/> (last visited Feb. 13, 2024); <https://www.newtonfiredepartment.org/> (last visited Feb. 13, 2024); <https://www.atlantichealth.org/locations/hospitals/newton-medical-center.html> (last visited Feb. 13, 2024). The Newton Public School District is a kindergarten through twelfth grade school district with an enrollment of over 1,500 students, and Sussex County Community College is also located in Newton. *See* <https://www.newtonnj.org/> (last visited Feb. 13, 2024); <https://www.sussex.edu/> (last visited Feb. 13, 2024).

²⁶ The Commission may waive a rule for good cause shown. The Commission may grant a request for waiver if it is shown that: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative. 47 CFR § 1.3. Waiver is appropriate where the particular facts make strict compliance inconsistent with the public interest. In making this determination, we may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *See Northeast Cellular Tel. Co., LP v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). Waiver is therefore appropriate if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest. *Id.* at 1166. *See WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-28 (D.C. Cir. 2008).

with the public interest,²⁷ and will only entertain a request to waive its general prohibition on the removal of a community's sole local service in the rare circumstance where such a removal might serve the public interest, by, for example, providing a first reception service to a significantly sized population.²⁸ We find that MBC fails to demonstrate any "special" or "rare" circumstances that would support removal of Newton's only local service as being in the public interest.

First, we disagree with MBC that West Caldwell has a more "dynamic and vibrant environment" and a "significantly larger population compared to Newton," such that moving the Station's community of license to West Caldwell "is consistent with FCC precedent" allowing removal of a community's sole local television transmission service.²⁹ Not only do West Caldwell and Newton have similar attributes as communities, they also have substantially similar populations. In fact, when looking at the communities and their roles in the context of the region they are located, as a percentage of their respective county, Newton is proportionally a larger community (representing about 5.8 percent of the county's population, whereas West Caldwell represents about 1.3 percent, a far smaller percentage of the county).³⁰ Moreover, Newton is the county seat of Sussex County, and, as such, is the center for the provision of a number of important governmental services for not just Newton, but all county residents.³¹

Second, MBC's proposed change in community appears to be simply preferred by the licensee based on the fact that WMBC-TV's headquarters and studio facilities are in West Caldwell.³² MBC states that "[a]lthough nominally licensed to Newton, MBC has always viewed its mission as serving the entire northern New Jersey region"³³ There is no need, however, to change WMBC-TV's community of license in order to air programming that is responsive to the needs, not just of its community of license, but also the interests of its entire viewing area. In addition, the fact that MBC maintains a production studio and headquarters in West Caldwell is not determinative with regard to the Commission's statutory mandate to "make such distribution . . . among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."³⁴ This is especially the case since the Commission eliminated the main studio rule before MBC filed its petition³⁵ and the Station's main studio has been located in West Caldwell since 2001.³⁶ MBC contends that it chose the site because it "provided a convenient centralized location with excellent access to the principal population centers."³⁷

²⁷ See e.g., *Change in Community Recon MO&O*, 5 FCC Rcd at 7096, para. 17; *Ardmore/Sherman R&O*, 7 FCC Rcd at 4846, para. 3.

²⁸ See *supra* p. 2.

²⁹ Petition at 7.

³⁰ See U.S. Census Bureau, QuickFacts, <https://www.census.gov/quickfacts/essexcountynewjersey> (last visited Feb. 14, 2024); and U.S. Census Bureau, QuickFacts, <https://www.census.gov/quickfacts/fact/table/sussexcountynewjersey/PST045223> (last visited Feb. 14, 2024).

³¹ See <https://sussexcountyclerk.org/> (last visited Feb. 13, 2024).

³² See Petition at 9.

³³ *Id.* at 7.

³⁴ 47 U.S.C. § 307(b).

³⁵ See *Elimination of Main Studio Rule*, MB Docket No. 17-106, Report and Order, 32 FCC Rcd 8158 (2017).

³⁶ Petition at 9. West Caldwell is located within the Station's principal community contour and therefore complied with the Commission's main studio rule when it was in effect. See 47 CFR 73.1125(a)(2) (2018).

³⁷ MBC also notes that its main studio and headquarters are located about five miles from its transmitter and tower.

While this may provide convenience, MBC's independent business judgement as to where to locate the Station's main studio and its headquarters does not provide the type of special circumstances that would warrant removal of Newton's sole local TV service. MBC also attached to its Petition a handful of correspondence from community leaders, non-profit organizations, and governmental entities, primarily thanking MBC or the Station for promoting their organizations on-the-air or making charitable contributions.³⁸ Although these efforts are laudable and the correspondence conveys support for the community of license change, such support is not alone determinative under the Commission's television channel allotment responsibilities as to whether waiver of the general prohibition of removing a community's sole local television service is in the public interest.

We also find MBC's proposal is distinguishable from the Commission's 1992 *Ardmore/Sherman R&O*, which MBC contends is analogous to its current circumstance. In the *Ardmore/Sherman R&O*, the Commission granted the request of the licensee of station KXII(TV) and removed channel 12, Ardmore, Oklahoma's sole *constructed* local television station, and reallocated it to Sherman, Texas. The licensee in that case argued that if each community were compared for a VHF allotment, Sherman would have been preferred because it was a significantly larger community.³⁹ In addition to the fact that Sherman was significantly larger by over 8,500 persons, the Commission concluded that since KXII(TV) was the only station providing a "Grade A" signal or better over Sherman and had sought to meet the needs and interests of the community, as evidenced by the fact that it maintained a main studio in Sherman for over twenty years with the Commission's permission, "[g]iven the size and importance of the community of Sherman, we believe formal recognition of this relationship is warranted."⁴⁰ None of these facts are present here. West Caldwell is not a significantly larger or more prominent community than Newton, and as previously stated, the main studio rule is no longer in effect. While KXII(TV) was the only station that provided city grade or Grade A signal to Sherman, here an analysis by Bureau staff found approximately twenty stations provide the digital equivalent of city grade service⁴¹ to West Caldwell.⁴² Moreover, the community of Ardmore was not deprived of its sole channel allotment since two vacant channel allotments remained for its use. In contrast, channel 18 is the only allotment assigned to Newton.⁴³ Based on all of these facts, we find MBC has failed to demonstrate that the public interest

Petition at 9.

³⁸ *Id.* at Exhibits 1-5.

³⁹ *Ardmore/Sherman R&O*, 7 FCC Rcd at 4846, para. 4. There were two vacant UHF allotments at both Sherman and Ardmore. *Id.* at n.3.

⁴⁰ *Id.* at 4847, paras. 5 and 11. At the time of this decision, KXII(TV) was operating an analog-only station and placed a 71 dBu signal strength or better contour over Sherman.

⁴¹ 47 CFR § 73.625(a)(1). The Commission recently amended its rules to create a new section 73.618 (Antenna location and principal community coverage), which relocates, verbatim, the language from section 73.625(a) (DTV coverage of principal community and antenna system). See *Amendment of Part 73 of the Commission's Rules to Update Television and Class A Television Broadcast Station Rules, and Rules Applicable to All Broadcast Stations*, MB Docket No. 22-227, Report and Order, FCC 23-72, at para. 37 (Sept. 19, 2023). The amended rules are not effective as of the date of release of this letter decision, and as such, we continue to reference 47 CFR § 73.625(a).

⁴² We note that television stations no longer have Grade A contours following the transition from analog to digital television. Some examples of stations that provide city grade-equivalent coverage of West Caldwell include, for example, WWOR-TV, Secaucus, New Jersey; WNET, Newark, New Jersey; WJLP, Middletown Township, New Jersey; and WNJB, New Brunswick, New Jersey.

⁴³ In its Petition, MBC argues that the allotment to West Caldwell is warranted because it has neither a TV or radio allotment. Petition at 6-7. As acknowledged by MBC, the Commission does not take into account radio allotments

would be served by granting waiver and permitting the removal of the sole allotment to Newton and reallocating it to West Caldwell.⁴⁴

Accordingly, Mountain Broadcasting Corporation's request for waiver of the Commission's general prohibition on removing a community's sole local television station from the Table of TV Allotments **IS DENIED** and its petition for rulemaking to change the community of license of WMBC-TV, from Newton, New Jersey to West Caldwell, New Jersey **IS DISMISSED**.

Sincerely,

/s/

Barbara A. Kreisman
Chief, Video Division
Media Bureau

when evaluating a petition to amend the Table of TV Allotments. TV and radio stations are distinct services and MBC has not provided any legitimate legal or factual basis why we should deviate from this long-held policy. As such, we give no weight to this argument.

⁴⁴ Other instances where the Bureau has granted waiver and permitted removal of a community's sole TV allotment also help demonstrate why the current case is different and does not warrant waiver. For example, in the *WUND Order*, the Bureau granted waiver and allowed the removal of the only television channel allotted to Columbia, North Carolina, and in its place added an allotment of first local television service to Edenton, North Carolina. The decision in the *WUND Order* was largely based on the fact that WUND was a NCE station and functionally acted as a "satellite" within a state-wide NCE network. The Bureau concluded that the request presented unique public interest considerations to find the most efficient manner to deliver educational programming to viewers across the statewide network. See *WUND Order*, 20 FCC Rcd at 12461-62, paras. 10-12 (discussing the special circumstances that warranted removal of Columbia's sole TV allotment and noting that the Commission has "traditionally shown great deference to state-wide educational broadcast systems in their efforts to provide and expand noncommercial programming to all of its citizens."). None of these unique factors are present here as, most notably, WMBC-TV is not a NCE station that simply rebroadcasts programming as part of a state-wide network. Also consider the *WPQX-TV Order* where the Bureau determined that there were clear public interest benefits that supported waiver and removal of Block Island's sole TV allotment and reallocation of that allotment to Newport, Rhode Island. *Amendment of Section 73.622(i), Digital Television Broadcast Stations (Block Island and Newport, Rhode Island)*, MB Docket No. 18-153, Report and Order, 33 FCC Rcd 8773 (MB 2018) (*WPXQ-TV Order*). Specifically the Bureau noted that reallocation would provide Newport, a community that was over 24 times the size of Block Island, with its first local television service. *Id.* at 8774, 8776, paras. 3 and 7. In addition, the Bureau found that there were significant differences in community attributes. *Id.* As discussed above, MBC fails to demonstrate similar differences between Newton and West Caldwell. *Supra* p. 5.