

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

In re Applications of

PIKE COUNTY File No. BPLIF-920506DE
BOARD OF
EDUCATION
Ariton, Alabama

GEORGE C. File No. BPLIF-920214DL
WALLACE STATE
COMMUNITY COLLEGE
Dothan, Alabama

For Construction Permit and License
in the Instructional Television
Fixed Service on Channels G1-G4

MEMORANDUM OPINION AND ORDER

Adopted: April 4, 1996;

Released: April 25, 1996

1. The Mass Media Bureau, acting pursuant to delegated authority, has before it for consideration the above-captioned mutually exclusive applications of Pike County Board of Education (Pike County) and George C. Wallace State Community College (George Wallace), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels G1-G4 in the areas of Ariton and Dothan, Alabama, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. Pike County, which is accredited by the

Southern Association of Colleges and Schools, proposes to serve the formal educational needs of students enrolled at schools located within and outside its jurisdiction. George Wallace is also accredited by the Southern Association of Colleges and Schools and it proposes to provide ITFS service to its own students, as well as to students enrolled at other nearby schools.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.¹ Second, three points are awarded to applicants which are accredited schools, educational institutions, or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.² Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Both of the applicants are entitled to four points under this criterion. Pike County is a school board that proposes to provide formal educational programming to students enrolled at schools within its jurisdiction. George Wallace is an educational institution that proposes to provide ITFS service to its own enrolled students.

Accreditation. Each applicant is accredited by the Southern Association of Colleges and Schools, and is entitled to three points under this criterion.

Four-Channel Limitation. Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a programming "grid."

weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

¹ A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

² One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed

Pike County's illustrative schedule and programming grid propose an average of 24.375 hours of ITFS programming per channel per week, all of which is formal educational programming. Thus, Pike County is entitled to one programming merit point. George Wallace's illustrative schedule and programming grid propose an average of 21 hours of ITFS programming per channel per week, all of which is formal educational programming. Consequently, George Wallace is also entitled to one programming merit point.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, no applicant is entitled to the one point for such applicants.

Total. Pike County and George Wallace are each entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal educational programming per channel per week, for a total of ten points. Because the applicants are tied, we must utilize our tie-breaker mechanism to determine the winning applicant.

TIE-BREAKER MECHANISM

5. When the comparative procedure results in a tie among two or more applicants, the parties are given 30 days from notification to negotiate an agreement regarding division of the use of channels. If no agreement is reached and advanced to the Commission within that time, the tentative selectee is determined through the tie-breaker mechanism detailed in *Instructional Television Fixed Service - Third Report and Order in MM Docket No. 83-523*, (*Third Report and Order*), 4 FCC Rcd 4830 (1989); *Third Report and Order Reconsidered*, (*Third Report Recon.*), 5 FCC Rcd 945 (1990); and 47 C.F.R. Section 74.913(d). This mechanism is based upon the submission by each applicant of the number of students at its proposed receive sites who are formally enrolled in classes for credit toward an academic degree or diploma or a legally required certification or license.³ Each applicant then has 15 days to respond to any aspect of the enrollment submissions. Once this response period has expired, the Commission compares the figures to determine if any applicant's system reaches less than 80 percent as many students as another applicant's. If so, the application resulting in service to the fewer number of students is denied, and the remaining application is granted. If more than one applicant remains, the channels or channel capacity are evenly divided among the remaining applicants. Because the applicants here did not reach an agreement regarding the use of the channels, we look to the enrollment figures submitted by each to determine the tentative selectee.

6. Pike County has provided documentation showing that a total of 14,098 students will be served at its specified receive sites. Only 2,552 of those students, however, attend schools within Pike County's jurisdiction, and the appli-

cant has not submitted appropriate letters of intended use from the other schools. We will, therefore, credit Pike County with 2,552 students. George Wallace has provided documentation showing that a total of 21,730 students will be served at the receive sites specified in its application. Therefore, we will credit George Wallace with 21,730 students. Because the number of students credited to Pike County, 2,552, is less than 80 percent of the number of students credited to George Wallace, 21,730, George Wallace will be authorized to operate facilities on Channels G1-G4 and the application filed by Pike County will be denied.

OTHER MATTERS

7. George Wallace proposes to lease its excess capacity for non ITFS use, as permitted by 47 C.F.R. Section 74.931 and has submitted a copy of its lease with Wiregrass Cable Television. The lease, however, does not entirely conform to the Commission's requirements. Specifically, the lease does not provide for the licensee's right to purchase the ITFS equipment at its fair market value in the event the lease is terminated as a result of some action on the part of the excess capacity lessee. We have consistently maintained that the licensee be permitted the opportunity to purchase the ITFS equipment necessary to maintain operation in the event of such termination. See *Turner Independent School District*, 8 FCC Rcd 3153, 3155 (1993). Although inconsistent with our requirements for excess capacity leases, the lack of such a provision in George Wallace's lease neither reflects on the applicant's basic or comparative qualifications, nor precludes a grant of an authorization, See *Highland Independent School District*, 10 FCC Rcd 13646, 13647 (1995). Nevertheless George Wallace's authorization will be conditioned upon conformity of the lease to Commission requirements. See *Henry County Board of Education*, 10 FCC Rcd 8066, 8067 (1995).

8. No petitions to deny or informal objections have been filed against George Wallace's application, and we find George Wallace fully qualified to be an ITFS licensee. We also conclude that grant of George Wallace's application would serve the public interest, convenience and necessity.

9. Accordingly, IT IS ORDERED, That the application of Pike County Board of Education (BPLIF-920506DE) IS DENIED, and the application of George C. Wallace State Community College (BPLIF-920214DL) IS GRANTED, subject to the condition that within 30 days of the release of this Order, George Wallace shall submit to the Chief, Distribution Services Branch for approval, information demonstrating compliance with the Commission's requirements, including, if appropriate, an amended excess capacity lease agreement conforming in the manner discussed herein.

³ Only receive sites specified as of the "B" cut-off date may be used in determining the number of students served. *Third Report Recon.*, 5 FCC Rcd at 945. Moreover, applicants serving students other than their own must have submitted letters, also by the "B" cut-off date, from those receive sites indicating an intention to use the proposed service. 47 C.F.R. Section 74.911(c); and *Third Report and Order*, 4 FCC Rcd at 4832. Specifically, those letters, signed by the administrator or author-

ity responsible for curriculum planning, must indicate that the applicant's programming offerings have been viewed and that such programming will be incorporated in the sites' curricula. Further, the letters should discuss the types and amounts of programming expected to be used and indicate the extent to which representatives from the various sites will participate in the planning, scheduling, and production of the programming. 47 C.F.R. Section 74.932, Note 2.

FEDERAL COMMUNICATIONS COMMISSION

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