

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Policies to Promote Rural Radio Service)	MB Docket No. 09-52
And to Streamline Allotment and)	RM-11528
Assignment Procedures)	

To the Commission:

PETITION FOR PARTIAL RECONSIDERATION

Radio One, Inc.	Scott Communications, Inc.
Minority Media and Telecommunications Council	Alexander Broadcasting Company, LLC
Ace Radio Corporation	Jackson Radio, LLC
Magnolia Radio Corporation	Radiotechniques Engineering LLC
Auburn Network, Inc.	Signal Ventures LLC
Chisholm Trail Broadcasting Co.	Wagon Wheel Broadcasting, LLC
Communications Technologies, Inc.	WRNJ, Inc.
Radio K-T, Inc.	Dot Com Plus LLC
Great South Wireless, LLC	Independence Broadcast Services
Brantley Broadcast Associates, LLC	Provident Broadcasting Company, Inc.
RAMS	Radio Training Network, Inc.
Skytower Communications-E'town, Inc.	Sacred Heart University, Inc.
Heritage Communications, Inc.	Horizon Broadcast Solutions
Anderson Associates	The Ridgefield Broadcasting Corp
Holladay Broadcasting of Louisiana	Westport Broadcasting
Alatron Corp., Inc	Radio New England Broadcasting, LLC
Legend Communications of Wyoming, LLC	Flinn Broadcasting Corporation
Border Media Business Trust	Arlington Broadcast Company
Music Ministries, Inc.	Memphis First Ventures, LP
Mullaney Engineering, Inc.	First Ventures Capital Partners, Inc.
Mattox Broadcasting, Inc.	Autaugaville Broadcasting, Inc.
Multicultural Radio Broadcasting Licensee, LLC	
Way Broadcasting Licensee, LLC	
Mississippi Broadcasters, LLC	

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May 6, 2011

SUMMARY

The Commission has adopted a new policy which reverses nearly 30 years of case law and relies on assumptions and speculation rather than a factual record. This new policy is very similar to the Suburban Community Policy applied to Section 307(b) comparisons prior to 1983 but discredited because the Commission recognized that preserving spectrum for future use was no longer necessary back then, that the policy was detrimental to localism, competition and diversity and only served to protect incumbent broadcasters from new entrants competing in their markets. Furthermore, the policy was denounced because it made assumptions about the applicant's future intent. Notwithstanding these prior pronouncements and without any factual basis, the Commission reverted to its failed policy which presumes that applicants proposing to serve a suburban community are not being truthful about their intentions. To overcome the presumption, the applicant must make a compelling showing that the proposed community is truly independent. This new policy is arbitrary, ill advised and misguided.

Section 307(b) imposes an obligation upon the Commission to distribute frequencies among the various communities equitably, efficiently and fairly. The statute requires the distribution of frequencies based on demand for its use. It says nothing about presuming the applicant's future intent to serve areas beyond its proposed community of license. There is no foundation for the Commission's inquiry into the likelihood of local programming under its Section 307(b) mandate. In adopting its new policy, the Commission has ignored its own past history, the purpose behind Section 307(b), the overwhelming majority of the comments and the need for local service to many deserving communities.

The Commission purports to justify the new policy by trumpeting the virtues of preserving rural service. However, there is no factual evidence that rural service is lacking or that demand for such service is not being met. Indeed, the Joint Parties and other commenters provided evidence to the contrary. After evaluating every city of license change application submitted since 2007 (when the freeze was lifted and new procedural rules were adopted), the Joint Parties demonstrated that in virtually every instance involving a station move from outside an urbanized area into an urbanized area, the previous (rural) service has been replaced by new service and in some cases, multiple new services that were not possible without the urban move. Given this factual history, the Commission's new policy represents an arbitrary reversal. As Justice Breyer wrote in another case involving an abrupt change in policy, "while it might be reasonable for an administrator to flip a coin to make an initial determination that drivers should use the right side of the road, that explanation is not at all rational if offered to explain why the administrator *changed* driving practice, from right-side to left-side, 25 years later."¹ Yet, in disregarding nearly 30 years of policy, the Commission is effectively telling radio applicants to drive on the other side of the road.

The Commission asked for comments in order to adopt a policy (not a rule) but then ignored the overwhelming majority of the comments. If the Commission believes that certain Tuck factors have become anachronistic, its focus should be on revising the factors. The Joint Parties make several suggestions in this pleading to make these criteria more relevant. The Commission should reconsider and update its Tuck criteria rather than create a new policy based on presumptions.

¹ *FCC v. Fox Television Stations*, 129 S.Ct. 1800, 1830-31 (2009).

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Multicultural Radio Broadcasting Licensee, LLC; Way Broadcasting Licensee, LLC and Mattox Broadcasting, Inc. (“Joint Parties”),² by their counsel, hereby submit this Petition for Partial Reconsideration to the *Second Report and Order, First Order on Reconsideration and Second Further Notice of Proposed Rule Making (“Second Report and Order”)*³ in the above captioned proceeding. The Joint Parties request that the Commission reconsider that portion of the *Second Report and Order* which revised its policies governing Section 307(b) evaluations in Urbanized Areas.⁴ In support hereof, the following is stated.

1. The Commission has decided that the “procedures”⁵ used to make Section 307(b) decisions for new AM and FM stations and community of license changes need to be adjusted in order to provide more opportunities for stations in smaller communities and rural areas, to protect listeners from losing their existing service and “to reflect more realistically the economic incentives.”⁶ The Commission reasoned that it wanted “to de-emphasize differences in population coverage as a principal metric in awarding Section 307(b) preferences” to focus more on the coverage area rather than the community of license.⁷ To accomplish this change in policy, the Commission adopted “a rebuttable presumption that, when the community proposed is located in an urbanized area or could,

² The Joint Parties are composed primarily of small businesses and minority entities.

³ 76 Fed. Reg. 18942, April 6, 2011, FCC 11-28, rel March 3, 2011.

⁴ The Joint Parties are not contesting any other portions of the decision (identified as “Tribal Priority”, “Band Hopping” or “AM Nighttime Mutual Exclusivity”).

⁵ The Commission states that it has changed its procedures. However, as will be discussed, the changes are substantive, not procedural. Hereafter the changes will be referred to as policy changes.

⁶ *Second Report and Order* at para. 19.

⁷ *Id* at para. 20.

through a minor modification application, cover more than 50 percent of an urbanized area, we will treat the application, for Section 307(b) purposes, as proposing service to the entire urbanized area rather than the named community of license.”⁸ In addition, the Commission stated that when considering a proposal under Priority 4 (other public interest matters), it would first consider “service to underserved listeners” before evaluating other relevant factors. In regard to *Tuck*⁹ showings, more detail and transparency in the showings will be required.¹⁰

2. The Commission adopted the policy changes without citing supporting evidence for its assumptions. As will be shown, the Commission’s decision was arbitrary and capricious. The only facts offered in support of the Commission’s proposal were provided by a single commenter¹¹ who postulates that if a community is relatively small compared to the central city in an Urbanized Area (“UA”), the incentive exists to serve the larger community rather than the smaller one.¹² Based on this speculative assertion and ignoring the overwhelming majority of comments and reply comments dispelling this notion, the Commission jumped to the conclusion that it had already preordained.¹³ There are no supporting facts which are probative of an applicant’s intent or reliable enough to predict whether or not the applicant will serve the proposed community of license. The

⁸ *Id.*

⁹ *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988).

¹⁰ *Second Report and Order* at para. 20.

¹¹ See Comments of William B. Clay.

¹² Clay Comments at 3-11 and Exhibits A-D.

¹³ Indeed, one commenter provided evidence that the rural markets have more radio services in relation to their population than the larger markets. See Comments of Carl T. Jones Corporation discussed in paragraph 18 *infra*.

Joint Parties, among others, provided factual information concerning the relatively small number of suburban city of license change applications and demonstrated that the Commission's proposals will have an inordinately more oppressive impact on new entrants, small businesses and minorities. Instead of fostering competition, the policy change will protect the larger incumbent group broadcasters from competition in the larger markets. Underlying each of the Commission's assertions and premises is the cynical notion that the first local service preference is being abused and that random communities are selected only to gain the Section 307(b) preference rather than to actually provide local programming to serve the needs of a particular community. Based primarily on these assumptions, the Commission has placed the burden of proof on the applicant to convince the Commission that its assumptions are wrong.

3. The Commission stated in the *Second Report and Order* that it has always been true that there is "greater economic opportunity in large metropolitan areas than...in smaller cities and rural areas."¹⁴ If that is the case then why, 75 years after Section 307(b) was adopted, 30 years after eliminating its *Suburban Community Policy*¹⁵ and 20 years after city of license changes were permitted, does the Commission now believe it is necessary to "forestall the excessive concentration" of stations in larger markets?¹⁶ The fact is that this is not a new policy and there are historical reasons why this policy failed to achieve its objectives in the past.

¹⁴ *Id* at para. 21.

¹⁵ See *The Suburban Community Policy, the Berwick Doctrine, and the De Facto Reallocation Policy*, 93 FCC 2d 436 (1983) ("Suburban Community Policy").

¹⁶ *Id* citing *Communications Investment Corp. v. F.C.C.*, 555 F.2d 954, 963-4 (D.C. Cir. 1981).

I. THE SUBURBAN COMMUNITY POLICY AND SECTION 307(B)

4. Section 307(b) imposes an obligation upon the Commission to distribute frequencies among the various communities equitably, efficiently and fairly. The statute requires the distribution of frequencies based on demand for its use. It says nothing about presuming the applicant's future intent to serve areas beyond its proposed community of license. Whether or not the applicant adequately serves its community is an inquiry separate and apart from the analysis required by Section 307(b). The distribution of frequencies does not contemplate that the Commission consider whether the applicant will have economic incentives to serve populations outside the community of license. The provision has always been interpreted to evaluate the community's need for service based on demand for the service. In changing its policy, the Commission disregarded its own past history, the purpose behind Section 307(b), the overwhelming majority of the comments and the need for local service to many deserving communities.

5. The idea that a licensee will not serve its community of license when the community is in a large market is not new or novel. As stated in the Joint Parties' Comments, the *Suburban Community Policy* was designed to keep stations from moving to more populated areas and to preserve the FM spectrum for future use in rural areas. However, the Commission announced in 1983 that the FM spectrum was a mature medium and that it had indeed preserved the spectrum during the early years of FM radio.¹⁷ The Commission found that, in view of the proliferation of radio stations throughout the country, it was no longer necessary to continue these policies. Now,

¹⁷ See *Suburban Community Policy*.

nearly 30 years later, the Commission reverts to its discredited pre-1983 policies without any finding of a lack of service in rural areas. The Commission ignored the underlying reasons behind its prior elimination of the *Suburban Community Policy* decision. The Joint Parties are perplexed and confounded by the Commission's actions and will demonstrate why reinstatement of these discredited policies is ill-advised and misguided. Contrary to the Commission's beliefs, these proposals will undermine the Commission's purported goals of diversity and community service under Section 307(b) by harming rather than advancing these objectives.

6. The *Second Report and Order* attempts to distinguish the *Suburban Community Policy* line of cases, saying that the "urbanized area presumption we adopt here involves a fundamentally different standard. First, the presumption will apply to all proposals in which the community of license is located within the Urbanized Area. Second, it applies to all proposals that could or would *provide service* to fifty percent or [sic] more of an urbanized area, as opposed to proposals that merely 'penetrate' a larger adjacent community as under the former suburban community."¹⁸ But the *Suburban Community Policy* also applied to communities within a UA and to proposals that cover at least fifty percent of the UA. These are meaningless distinctions. "Third, one of the primary rationales for the Commission's rejection in 1983 of the former suburban community policy was the check of a potential comparative hearing between an incumbent licensee and a new station challenger." If the Commission's position is that the reason it rejected the former *Suburban Community Policy* in 1983 was to eliminate comparative hearings, it is entirely missing the point. These distinctions are not serious

¹⁸ *Second Report and Order* at para. 28.

attempts to deal with the issues raised in this case. Rather they are selective attempts designed merely to achieve a particular result.

7. In eliminating the *Berwick Doctrine*, the Commission stated that the FM service had “become a mature medium” and the need to preserve service for rural areas was no longer needed.¹⁹ It articulated its underlying reason as follows -- “we do not believe it is appropriate to question the intent of the party seeking an assignment to a particular community in the rule making process.”²⁰ That pronouncement has been the Commission’s steadfast position ever since. The Commission found that its policies, formerly designed to further its Section 307(b) objectives, were actually frustrating those goals by depriving smaller communities located near larger urban communities from having their own local service.²¹ The Commission noted that these policies were being used by incumbents for anticompetitive purposes to keep new entrants out of their markets.

8. The Commission articulated its reasons for eliminating the policies as “relics of an earlier age when there was a paucity of local transmission services....Although the policies may have served legitimate public policy concerns years ago, they have outlived their usefulness and, in fact, may actually undermine the policies underlying Sec. 307(b)...The policies have denied local facilities to suburban American communities....It makes no sense in 1982 to view such current proposals [for new service] in light of American social structure of 1965 when the *Suburban Community*

¹⁹ *Revision of FM Assignment Policies and Procedures*, Second Report and Order, 90 FCC 2d 88 (1982).at ¶14.

²⁰ *Id.* at ¶ 37

²¹ *Id.* at ¶ 1.

Policy was first adopted.”²² What reasons now justify the Commission reinstating these policies nearly 30 years later?

9. The Commission found that these policies inhibit entry into unserved communities, that suburban communities are often as attractive to applicants as the larger nearby cities, and that the policies undermine Section 307(b) goals by delaying or eliminating competition (diversity) in many markets.²³ Then the Commission turned its attention to the assumption underlying the discredited policy that the applicant intends to serve the larger urban area rather than the community that it specifies. The Commission concluded that there was no support or basis in the record for such a finding.²⁴ The Commission realized that not only was the policy impractical and of dubious legality under the Communications Act, but such policies consistently presume future behavior on the part of the applicant that the Commission cannot substantiate.

10. On reconsideration, the Commission affirmed the elimination of its policies that prohibited suburban communities from obtaining their own local service by

²² *Id* at ¶ 12.

²³ *Id* at ¶ 20. The Commission also stated, “[o]ur major concern with the policy is that rather than furthering the purposes of Sec. 307(b), the *de facto* reallocation policy, as applied, has frustrated that end. It is most often invoked against small market stations. The frequent proponents of the policy are licensees located in larger communities who will face increased competition as the result of an application to modify or improve facilities filed by licensees in nearby smaller communities. [Citations omitted] The arguments proponents make in support of *de facto* reallocation are strikingly similar to those made by proponents of the suburban community/Berwick policies: that a station in the smaller community will, as the result of the modification, direct its service to the larger community thereby abandoning its community of license, undermining the Tables, and subverting the goals of Sec. 307(b). Changes in the industry, as we described above, no longer pre-ordain such results. Moreover the policy places a burden on the establishment and improvement of service in small communities that is not in keeping with the objectives of Sec. 307(b). We are also convinced that the policy too frequently is invoked to preclude additional competition. Such a result is an abuse of the policy.” *Id* at ¶ 35.

²⁴ This was not the first and would not be the last time that the Commission commenced a proceeding to consider changing the concept of community to thwart the motivations of the applicant to serve a larger population and to avoid awarding a comparative preference for a community that the Commission believes is unlikely to be served. *See, e.g., Faye and Richard Tuck, Memorandum Opinion and Order*, 3 FCC Rcd 5374 (1988).

stating “rather than abandoning our Sec. 307(b) mandate, we seek to accomplish its objective of providing broadcast service to underserved areas through elimination of these outdated and ineffectual policies and rules....The policies eliminated in the Report and Order were found to have inhibited entry into underserved communities due to the increased costs to suburban applicants and the concomitant delays....these policies had provided incumbent stations a means to delay competition from new suburban stations and thereby frustrated the goal of Sec. 307(b).”²⁵

11. Now, nearly 30 years later, the Commission, without any finding that there has been a mass migration of stations from rural to urbanized areas or that there is any lack of service in rural areas, has reinstated these deeply buried relics with the justification that the Commission (in 1983) was only interested in eliminating comparative hearings. What the Commission fails to do is demonstrate how it can appropriately presume the applicant’s intent, how it can overcome the anti-competitive consequences of its former policy, how it will foster diversity and localism by forcing stations to remain in communities that can no longer support them and why it was wrong nearly 30 years ago when it stated that it had achieved its goals of preserving service to rural areas. It is astonishing that the Commission has changed its policy at this time without proffering any factual evidence in support of such change.

12. In every market across the nation there are numerous suburban communities without local service. These communities have grown in past decades for many reasons including population growth, urban flight, new housing developments, shopping centers, transportation systems and various other reasons. Each community has

²⁵ *Suburban Community Policy*, at ¶ 17 (1984).

its own character and unique qualities which set it apart from the central city or other suburban communities. Some are characterized by a concentration of ethnic or racial populations, some by military families, some by large business centers. Unlike the central city which usually consists of a diversity of cultural or ethnic groupings, these suburbs tend to be more homogeneous. Their needs are more easily defined and well suited for a radio station with a specialized program format.

13. Not all suburban communities develop at the same rate. Some have shown substantial growth only in the last decade. But the availability of radio spectrum for a suburban community rarely exists (unlike rural areas). When the spectrum does open up due to a move by another station, a suburban community may benefit. To allow some suburban communities to enjoy their own local service during the past 30 years but to cut it off for those communities that have only recently undergone growth or only recently have found spectrum availability, is arbitrary and unreasonable.

14. On the other hand, there are numerous reasons why a station may desire to leave its community. For example, at the time the station commenced operations, it may have been the only station in town and was economically viable. However, over time, there may have been two or three additional stations added to the community and the station can no longer compete relying on such a limited advertising base and listenership. Or the community has declined in population in recent years and has become unable to support the station as businesses have moved elsewhere and residents have relocated. The Commission does not acknowledge this scenario at all. The Commission should consider these facts as part of the showing if the new proposed suburban community is otherwise eligible for a first local service. A station should not be forced to

remain in a community that has other stations but can no longer support all of them. Section 307(b) contemplates a distribution based on demand for service in a particular community. If the demand is not there, the station should not be forced to remain.

15. There are many instances where a new or growing community has residents willing to embrace a new station. Communities do not remain stagnant and the spectrum does not remain stagnant. However, under the new policy, the Commission will require a compelling showing of need for the station to relocate. Without such a showing, the station is forced to survive without the support of its community because the Commission cannot trust the station to provide service to the proposed independent suburban community. In this regard, when stations perform the *Tuck* showing, they actually talk to community leaders and residents and ascertain the community's needs. The station owner is the one who is best positioned to determine whether there are indications of support and to ascertain expectations of local service. It is the broadcaster who should decide to take the business risk based on its determination of local support and its ability to deliver on those expectations. The fallacy in the Commission's assumptions is that radio stations will not provide local programming when there are "economic incentives" to serve a larger audience. The fact is, broadcasters recognize that localism is the lifeblood of the station's survival. It is what sets them apart from all other forms of delivery services. Broadcasters cannot ignore their communities without risking their own station's viability.

II. ARBITRARINESS

16. Under the Administrative Procedure Act, the standard for reconsideration of an action taken by the Commission is whether it is "arbitrary, capricious, an abuse of

discretion, or otherwise not in accordance with law.”²⁶ The Commission should grant a petition for reconsideration where the petitioner demonstrates that the Commission made a material error or omission.²⁷ In reversing nearly thirty years of precedent without proper justification, the policies that the Commission adopts in the *Second Report and Order* are arbitrary and capricious. Thus, a “searching and careful” inquiry must be undertaken by the Commission to determine whether the decision “was based on a consideration of the relevant factors” and not on baseless conclusions.²⁸

17. Where, as here, the Commission adopts procedures that depart from an established status quo policy, it must “supply a reasoned analysis for the change.”²⁹ It is not sufficient for the Commission to offer a rational explanation for establishing a *new* policy, the Commission must also explain “*why* it has come to the conclusion that it should change direction” and “reject the considerations that led it to adopt that initial policy.”³⁰ The Commission “cannot simply disregard contrary or inconvenient factual

²⁶ 5 U.S.C. §706(2)(A).

²⁷ See Section 1.106 of the Commission’s Rules; *In the Matter of Direct Broadcast Satellite Public Interest Obligations*, 19 FCC Rcd 5647, 5650 ¶7 (2004).

²⁸ See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

²⁹ See, e.g., *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 41 (1983); *Am. Tel. & Tel. Co. v. FCC*, 974 F.2d 1351, 1354 (D.C. Cir. 1992) (“we will not uphold an agency’s action where it has failed to offer a reasoned explanation that it is supported by the record.”)

³⁰ *FCC v. Fox Television Stations*, 129 S.Ct. 1800, 1830-31 (2009) (Breyer, J., dissenting) (emphasis in original). Although Justice Kennedy joined the majority in *Fox*, he wrote a concurring opinion supporting the four dissenting justices’ in adhering to the *State Farm* standard that an agency must carefully explain its rationale for departing from a settled course. See *Fox*, 129 S.Ct. at 1824 (Kennedy, J., concurring) (“[A]n agency’s decision to change course may be arbitrary and capricious if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so.”).

determinations that it made in the past.”³¹ Yet that is exactly what the Commission did in the *Second Report and Order*.

18. The Commission did not need to institute a rule making proceeding since it did not adopt or amend any rules. But having done so in order to solicit comments on its policy changes, it is baffling that the Commission would then ignore all but one of the substantive comments filed! The Commission acknowledged that a “majority, though by no means all, of the commenters firmly endorse retention of the *status quo*....” That is a tremendous understatement. Appendix C of the *Second Report and Order* lists the Commenters and, of those commenting on the Section 307(b) policy changes, the overwhelming majority opposed the changes.³² Thus, by ignoring or failing to adequately address the opposition comments, the Commission acted arbitrarily without record support. It is also unreasonable to treat similarly situated stations in a different manner. The Commission is singling out stations that propose a first local service and holding them to a different standard than stations that are currently licensed to a suburban community and to stations that propose service to communities outside an urbanized area. The Commission’s response was “we are no longer convinced that the Commission’s ability to enforce a broadcaster’s public interest obligations after licensing justifies limiting evaluation of a proposed broadcast service at the authorization stage.”(emphasis added)³³ Are we to conclude from that statement³³ that there is new evidence that justified the Commission’s new policy? If so, it cannot be found in the record and it was not

³¹ *Id.* at 1824 (Kennedy, J., concurring).

³² There were several commenting parties that urged the Commission to preserve spectrum in the larger markets for LPFM service which was beyond the scope of the proceeding. They are not considered to have provided substantive comments on the proposal.

³³ *Second Report and Order* at ¶28.

articulated in the decision. What made the Commission change its mind? What are the conditions or circumstances that exist now that did not exist during the last 30 years?

19. The Commission further states, “some commenters have suggested increasing the renewal reporting burden for stations in order to confirm the bona fides of their local transmission service, [but] we believe the better course is not to impose such burdens, but rather to evaluate the totality of the proposed service when determining whether to award a Section 307(b) preference.....This will place our Section 307(b) preferences on a firm factual foundation.”³⁴ This statement prompts several questions. Are we to conclude that the Commission has decided, based on the record in this proceeding, that it will not impose any stricter local service obligations in the renewal context in its pending *Broadcast Localism* proceeding?³⁵ Or does the Commission mean that it will not impose the stricter obligation in the context of the instant proceeding? If that is the case, how did the Commission conclude that the “better course” is to impose the stricter standard on new (and pending proposals)? On what basis did it make this determination? Is the Commission trying to salvage some semblance of localism policy here rather than in the *Broadcast Localism* proceeding where it is more appropriate to consider such actions? The lack of rationale for the Commission’s conclusions is staggering.

20. There is no rural radio “crisis”. There are plenty of opportunities for service in rural areas. It is the demand for the service that is lacking. In FM Auction 79, held in September 2009, 37 permits out of a total of 122 permits (30%) received no bids.

³⁴ *Id.*

³⁵ 23 FCC Rcd 1324 (2008) MB Docket No. 04-233.

In FM Auction 91, currently in progress, there are 36 permits without any bids out of a total of 144 permits (25%) being offered. Perhaps the explanation that was provided by one of the commenters is revealing. The Comments of Carl T. Jones Corporation (“CTJC”) states that “[t]he idea that stations are migrating away from smaller communities has gained such momentum recently, it is now accepted as fact. CTJC has seen neither studies nor documentation of a mass exodus of radio stations from rural to urban areas....Radio is a mature service and Rules and policies have [sic] been in place for many years to ‘help restrict the migration of stations’.”³⁶ CTJC provides a chart which demonstrates that, based on the number of stations per person in each of the top 300 markets, there is a correlation which suggests the larger the market, the greater the need for additional service in almost every instance. The Commission’s response to this showing was that it placed “an undue, if not exclusive, emphasis on the term ‘efficient’ in Section 307(b)’s mandate....”³⁷ Again, the Commission is critical of findings supported by facts but provides no facts of its own to support its conclusions.

21. The Joint Parties painstakingly studied every community of license change application filed since new rules went into effect that allow these proposals to be filed by application rather than by rule making (Jan. 19, 2007), and only 19% (110 out of 561 applications)³⁸ proposed communities in or that covered at least 50% of a UA. Indeed, the percentage has declined in recent years and was only 10% last year (2010). On the other

³⁶ CTJC Comments at p. 6.

³⁷ *Second Report and Order* at ¶21.

³⁸ The study was based on the number of Tuck showings submitted with the applications. This number is overstated because Tuck showings are often submitted when the application is for a station relocating from one urban community to another. Such showings are not required but submitted anyway. Thus the actual number of rural to urban moves is considerably less than 110.

hand, the Commission auctioned off or awarded new permits to 940 new stations in rural areas during the same time period. It is difficult to comprehend the Commission's action in view of the relatively few stations filing applications to move into urbanized areas while the great majority of new stations and relocations are moves into rural areas. As Justice Breyer wrote in another case involving an abrupt change in policy, "while it might be reasonable for an administrator to flip a coin to made an initial determination that drivers should use the right side of the road, that explanation is not at all rational if offered to explain why the administrator *changed* driving practice, from right-side to left-side, 25 years later."³⁹ Yet, in disregarding nearly 30 years of policy, the Commission is effectively telling radio applicants to drive on the other side of the road.

III. REVISIONS TO TUCK SHOWINGS

22. Perhaps all that is needed to accomplish the Commission's objective is to establish more realistic *Tuck* criteria on which to base the finding of independence as the Commission suggests.⁴⁰ As long as the finding of independence is real, it does not also need to be compelling. Underlying the Commission's belief that the existing criteria is too lenient is the impression that nearly all applications containing Tuck showings are able to demonstrate independence. Even if that is true to a degree, it does not follow that the criteria is too lenient. The Commission does not see all of the attempts that are not successful. Only those that meet the *Tuck* criteria are filed. The Commission only sees these filings after applicants have performed extensive research and ascertained whether the factors are met before filing. Most communities in suburban areas cannot be shown to

³⁹ *Fox*, 129 S.Ct. 1830-31 (Breyer, J., dissenting).

⁴⁰ *Second Report and Order* at ¶ 30.

be independent. Thus, when the Commission says it will rigorously scrutinize the *Tuck* criteria, its perspective does not originate from the same vantage point as that of the applicants who have actually performed the research before filing. Nevertheless, the Joint Parties agree it would be useful to reevaluate the criteria in view of the fact that some of the factors have become irrelevant.⁴¹

23. The first factor involves the extent to which residents work in the proposed community of license. This factor relies on data taken from the US Census. However, the last available data was provided in the year 2000 and this type of data can become outdated and unreliable quickly. Many people change jobs each year and over the course of a 10 year period there can be a large turnover in employment that is not reflected in the data. Perhaps in recognition of this fact, the U.S. Census Bureau has stopped collecting data concerning the percentage of residents working in their own community.⁴² Therefore, this information is no longer available and the factor should be eliminated.

24. The second factor asks whether there is any local media so that residents do not need to rely on the central city for news about their community. Very seldom are proponents able to show that there are local newspapers since, as the Commission recognized in the *Second Report and Order*, newspapers have declined precipitously even

⁴¹ *Id.*

⁴² Instead the data is collected as part of the American Community Survey (“ACS”). While this approach might provide useful data for certain purposes, it is entirely unreliable for evaluating the *Tuck* criteria. As its name indicates, the ACS is a *survey*, not a census, and requires statistical projections based on three million surveys per year, or less than one percent of the country’s population. Thus, for those areas most relevant to *Tuck* showings, the data will be unreliable and will have a large margin of error that could materially affect the Commission’s disposition of the application.

in the large cities.⁴³ Obviously there are no radio or television station in the proposed community, which is why the proponent is offering to provide such service. Typically, the residents rely on out of town stations or newspapers for local news. Thus, this factor should have little significance in the overall analysis.

25. The third factor concerns the perception of residents and community leaders. The Commission notes that proponents often provide self serving letters from residents which attest to community status. The Commission says it wants actual evidence that the residents consider their community separate and distinct. Proponents have offered historical information in the past to show that there is a distinct character to the community and there are objective reasons for the community's separate existence. If letters from the community are not considered objective enough, the Commission should clarify what it considers actual evidence. Otherwise, this factor should be eliminated.

26. The fourth factor asks whether the community has a local government and elected officials. This is clearly the most important factor and should be weighed much more heavily than any of the other factors. Most local governments provide their residents with municipal services—police and fire protection, water, sewage, etc. In addition, many local governments have taxing authority which enables them to provide many cultural and social services as well. These community services are really what creates independence. In past cases, whenever this factor is satisfied, a finding of independence can be expected. Thus, the other factors become important only when the community does not have its own local government.

⁴³ *Second R&O* at ¶ 30 (“Similarly, with the closing of major city newspapers, the lack of a local newspaper should not necessarily be fatal to a finding of independence.”)

27. The fifth factor considers whether the community has its own zip code and phone directory. In recent years, there has been a large number of post office closings and consolidations.⁴⁴ The presence of a post office and zip code is no longer indicative of independence. The same can be said of phone directories, with the Internet eliminating the need for a local phone directory. Today, a consumer is far more likely to conduct a proximity search online using a resource such as yellowpages.com or switchboard.com than to consult a printed directory.⁴⁵ Thus, this factor should not be weighed as heavily as in the past.

28. The sixth factor is whether there are commercial establishments, community organizations and health care providers. The existence of businesses, cultural activities and health care are certainly important in determining whether the residents depend on the central city. With a sufficient number of businesses, it also follows that residents have employment opportunities without depending on the central city. This factor can be given significant weight.

29. The seventh factor asks whether there are any advertising sources. This factor relates to the second factor. If there is local media than local businesses can find advertising sources. But, as discussed, newspapers are declining and there is no radio station. So this factor should also be eliminated.

⁴⁴ See Ed O’Keefe, *Postal Service to Close 2,000 Sites in Next Two Years*, Wash. Post, Jan. 24, 2011, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/24/AR2011012405865.html>.

⁴⁵ See Press Release, TMP Directional Marketing, *TMP Directional Marketing Study Reveals Local Search Changing With Interactive Media, Indicates Consumer Search Behavior and Media Usage Trends* (Oct. 8, 2009), available at <http://www.tmpdm.com/press/2009/tmpdm-study-reveals-local-search-changing.asp> (finding that “a majority or consumer search behavior has shifted toward the use of interactive resources” and away from print directories).

30. The last factor deals with municipal services which are commonly found in communities with local government. This factor is superfluous and should instead be combined with the fourth factor (local government and elected officials).

31. In their Joint Dissenting Statement in *Evergreen, Alabama and Shalimar, Florida*⁴⁶ and in *Lincoln and Sherman, Illinois*,⁴⁷ Commissioners Copps and Adelstein state they were “not proposing that we eliminate *Tuck*, only that we enforce it.” The Joint Parties agree. If the *Tuck* factors are properly revised to reflect the changes in community independence since the *Tuck* case was decided in 1988, as discussed above, then the Commission can carry out its obligations under Section 307(b) more effectively.

IV. PRIORITY 4 ANALYSIS

32. The Commission announced in its *Second Report and Order* that with regard to Priority 4 cases, the staff will first determine whether the proposal will reduce the number of reception services in the loss area to three, four or five affecting at least 15% of the overall population to be served and, if so, the proposal will be strongly disfavored. Less emphasis will be placed on raw population gain figures. Instead, a detailed showing of the number of services in the loss and gain areas will be required. In addition, the Commission will also strongly disfavor removal of a second local service from a community with a population of 7,500 or greater when making Priority 4 comparisons.

33. Before the Commission considers the weight that should be accorded to the number of reception services, the Joint Parties believe that the Commission should

⁴⁶ 23 FCC Rcd 15846 (2008).

⁴⁷ 23 FCC Rcd 15835 (2008).

clarify what constitutes reception service. Over time, the definition has been modified on an *ad hoc* basis and some consistency needs to be established before a meaningful comparison is made. There are two situations that impact this evaluation--existing service (operating stations) and potential service (unbuilt permits, vacant allotments and maximum facilities for the class of station). When an operating station changes city of license and moves its site, it creates loss of existing service. In determining the remaining services in the loss area, if only the stations that are operating and not those that will provide service in the future (potential service) are considered for loss area, then the results are skewed. However, under current case law, there is a combination of existing and potential service that is used for this evaluation.⁴⁸ Although the Media Bureau stated that potential service should not be considered for the operating station that proposes to relocate, the Bureau does consider potential reception service when it employs maximum facilities for the class of station, not actual facilities. When maximum facilities are factored in, the results are often unrealistic, since many stations are not able to increase their facilities beyond their current operation due to grandfathered short spacings, contour protection, and various other reasons. Otherwise these stations would have maximized their facilities many years earlier. On the other hand, an unbuilt permit that was purchased in a recent auction is not considered under the *Sells* case.⁴⁹

34. In contrast, when an unbuilt permit proposes to change its transmitter site, the remaining service analysis takes into account the potential service from maximum

⁴⁸ See *Sells, AZ, et al.*, 23 FCC Rcd 1242 (2008) at note 32, *Appl for Review pending*, which uses maximum facilities for the class of station but not vacant allotments or unbuilt permits. This case overruled the previous test which was set forth in the case of *Greenup, Kentucky and Athens, Ohio*, 6 FCC Rcd 1493 (1991) which included potential service from vacant allotments and unbuilt permits where the loss area is being deprived of an existing service. See also, *Eldorado, Texas et al.*, 22 FCC Rcd 280 (2007).

⁴⁹ *Id.*

facilities, other unbuilt permits and vacant allotments as well as operating stations. Consistency is needed so that the correct comparisons are made and applicants can easily determine and understand what types of showings are required. When properly evaluated this approach will more accurately demonstrate the impact on listeners who are actually or potentially losing or gaining service. The Joint Parties are advocating consistency and uniformity so that all consulting engineers use the same method and the Bureau can more easily verify the showings.

35. The Commission's *ad hoc* approach to gain/loss analyses should also be clarified in regard to the signal level for AM, FM and NCEs so that applicants know what showings are required and the Commission can evaluate these showings applying the same standards. For example, AM stations are evaluated by their nighttime interference free ("NIF") service. This contour most closely corresponds to the 70 dBu principal community contour in the FM service rather than the 60 dBu protected service contour which is actually used in evaluating FM service. The Bureau should consider using a reception service contour for AM service evaluations rather than consider only the NIF contour. In addition, no consideration is given to the daytime signal of full time AM stations and thus, daytime only stations are ignored altogether. But many listeners rely on daytime signals especially in rural areas. A 2 mV/m contour for the daytime signal could be considered for the loss and gain area analyses. The case law provides no guidance.

36. As for potential service, AM stations and NCE stations do not have maximum facilities or vacant allotments. So potential service seems to be primarily a commercial FM phenomenon. Some thought should be given to the effect of this

disparity in the gain and loss evaluations when the station moving is an AM or a NCE station.

37. Another inconsistency should be addressed in the context of using the FM allotment point for gain/loss purposes and not the actual transmitter site. In some cases, the allocation site might be 20 miles or more from the proposed transmitter site. Such an analysis can produce anomalous results which can be manipulated by the selection of the reference coordinates and provides no useful results when considering how many actual listeners will be impacted.

38. The Joint Parties believe that the Commission must decide on a consistent standard for evaluating remaining services in the loss and gain areas for relocations of existing stations and unbuilt permits. These suggestions were also offered by the Joint Parties in response to the *NPRM* in this proceeding but ignored in the *Second Report and Order*. Clarification is more important now that the Commission has placed greater emphasis on rural service in the loss area. The Commission will discover that there is much more rural service being provided than it had previously believed to be the case.

CONCLUSION

39. The Commission has arbitrarily reversed nearly 30 years of case law and policy without a factual basis and contrary to the overwhelming majority of the comments. It misconstrues its obligation to distribute frequencies pursuant to Section 307(b) of the Communications Act. The Commission can accomplish its policy objectives by updating its Tuck criteria. It does not need to resort to assumptions and speculations about an applicant's future intentions. The Commission must reconsider its new policy.

Respectfully submitted,

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Minority Media and
Telecommunications Council
Ace Radio Corporation
Magnolia Radio Corporation
Auburn Network, Inc.
Chisholm Trail Broadcasting Co.
Communications Technologies, Inc.
Radio K-T, Inc.
Great South Wireless, LLC
Brantley Broadcast Associates, LLC
RAMS
Skytower Communications-E'town, Inc.
Heritage Communications, Inc.
Anderson Associates
Holladay Broadcasting of Louisiana
Alatron Corp., Inc
Legend Communications of Wyoming, LLC
Border Media Business Trust
Music Ministries, Inc.
Mullaney Engineering, Inc.
Mattox Broadcasting, Inc.
Multicultural Radio Broadcasting Licensee, LLC
Way Broadcasting Licensee, LLC

Scott Communications, Inc.
Alexander Broadcasting Company,
LLC
Jackson Radio, LLC
Radiotechniques Engineering LLC
Signal Ventures LLC
Wagon Wheel Broadcasting, LLC
WRNJ, Inc.
Dot Com Plus LLC
Independence Broadcast Services
Provident Broadcasting Company, Inc.
Radio Training Network, Inc.
Sacred Heart University, Inc.
Horizon Broadcast Solutions
The Ridgefield Broadcasting Corp
Westport Broadcasting
Radio New England Broadcasting,
LLC
Flinn Broadcasting Corporation
Arlington Broadcast Company
Memphis First Ventures, LP
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May 6, 2011