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DOCKET FILE COPY ORIGINAL

Re: Detroit Lakes and Barnesville, Minnesota
MM Docket No. 00-53; RM-9823

Dear Ms. Salas:

Transmitted herewith on behalf of Triad Broadcasting Co., L.L.C., are an original and four copies of its Comments filed in response to the *Notice of Proposed Rule Making*, DA 00-645 (released March 24, 2000), in the above-referenced proceeding.

Should any questions arise concerning this matter, please communicate directly with this office.

Very truly yours,
FLETCHER, HEALD & HILDRETH, P.L.C.


Andrew S. Kersting
Counsel for Triad Broadcasting Co., L.L.C.

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of)
)
Amendment of Section 73.202(b),) MM Docket No. 00-53
Table of Allotments,) RM-9823
FM Broadcast Stations,)
(Detroit Lakes and Barnesville, Minnesota))

To: Chief, Allocations Branch

COMMENTS OF
TRIAD BROADCASTING CO., L.L.C.

TRIAD BROADCASTING CO., L.L.C.

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May 15, 2000

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SUMMARY

The D.C. Circuit has determined that, in implementing Section 307(b) of the Communications Act, the FCC's paramount responsibility is to achieve a "fair, efficient and equitable distribution of radio service" *National Association of Broadcasters v. FCC*, 740 F.2d 1190 (D.C. Cir. 1984), quoting 47 U.S.C. §151. The court has further instructed the Commission that "[t]he ultimate touchstone for the FCC is thus the distribution of *service*, rather than of licenses or stations; the constituency to be served is people, not municipalities." *Id.* (emphasis added).

In the seminal case of *Faye & Richard Tuck*, 3 FCC Rcd 5374 (1988), the Commission expressly recognized that the grant of a dispositive preference to an applicant proposing a first local service near a metropolitan area has the potential to produce "anomalous results" that can contravene the statutory mandate of Section 307(b). *Id.* at 5374. Accordingly, in adopting Section 1.420(i) of the FCC's rules, the Commission stated that it would not apply the first local service preference of its allotment criteria blindly in order to avoid allowing an "artificial or purely technical manipulation of the Commission's 307(b) related policies." *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd 7094, 7096 (1990).

In this case, the proposed reallocation of Channel 236C1 from Detroit Lakes to Barnesville, Minnesota, would contravene the objectives of Section 307(b) because it would result in shifting service from an underserved rural area to a well-served urban area without any countervailing public interest benefits. In applying the *Tuck* criteria in a manner consistent with Section 307(b), *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir. 1951), and *RKO General, Inc. (KFRC)*, 5 FCC Rcd 3222 (1990), it is evident that the community of Barnesville does not warrant

a first local service preference because it is not independent of the Fargo-Moorhead Urbanized Area.

In considering the proposed reallocation under the Commission's fourth allotment priority, Barnesville should be attributed with the 13 or more radio services which currently serve the Fargo-Moorhead Urbanized Area. Detroit Lakes, on the other hand, has only three radio stations, and is more than three times the size of Barnesville.

Furthermore, the proposed reallocation of Channel 236C1 would result in a loss of service to underserved areas, including an area which would receive only two full-time aural services. Therefore, the proposed reallocation of Channel 236C1 would not result in a preferential arrangement of allotments and should be denied.

BEFORE THE

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WASHINGTON, D.C. 20554

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Amendment of Section 73.202(b),)	MM Docket No. 00-53
Table of Allotments,)	RM-9823
FM Broadcast Stations,)	
(Detroit Lakes and Barnesville, Minnesota))	

To: Chief, Allocations Branch

COMMENTS OF TRIAD BROADCASTING CO., L.L.C.

Triad Broadcasting Co., L.L.C. (“Triad”), by counsel, and pursuant to Section 1.415 of the Commission’s rules, hereby submits its comments in response to the *Notice of Proposed Rule Making*, DA 00-645 (released March 24, 2000) (“*NPRM*”), proposing the reallocation of Channel 236C1 from Detroit Lakes to Barnesville, Minnesota, and the modification of the license of Station KRVI(FM),¹ Detroit Lakes, to specify Barnesville as its community of license. In support of these comments, the following is stated:

I. Introduction.

The proposed reallocation of Channel 236C1 from Detroit Lakes to Barnesville would enable Station KRVI to provide a city-grade signal to the entire Fargo-Moorhead Urbanized Area.² However, from KRVI’s existing transmitter site near Rollag, Minnesota, Station KRVI currently

¹ Since the *NPRM* was issued, the call letters of Station KFGX(FM), Detroit Lakes, Minnesota, have been changed to “KRVI”. In these comments, Triad will refer to the Detroit Lakes station by its new call letters.

² See Engineering Statement of Roy P. Stype, III, p. 3 (appended hereto as Appendix A).

provides a city-grade signal to approximately 54% of the Fargo-Moorhead Urbanized Area.³ Thus, under existing Commission precedent, T&J Broadcasting, Inc. (“T&J”), was not required to submit a *Tuck*⁴ showing.⁵ As demonstrated herein, however, the Commission should review T&J’s proposal pursuant to the *Tuck* criteria because the proposed reallocation of Channel 236C1 from Detroit Lakes to Barnesville is inconsistent with Section 307(b) of the Communications Act, and should not result in the award of a first local service preference. Under the Commission’s fourth allotment priority,⁶ the proposed reallocation would not result in a preferential arrangement of allotments because (1) all of the services within the Fargo-Moorhead Urbanized Area should be attributed to Barnesville, and (2) the proposed reallocation would result in a significant loss of service to underserved areas.

To put the facts presented by T&J’s reallocation proposal in the proper legal context, set forth below is a discussion regarding the Commission’s treatment of Section 307(b) issues historically, as well as selected examples of the Mass Media Bureau’s (“Bureau”) application of the *Tuck* criteria in cases involving a change in community of license where the specified community is relatively small and located either within or near an Urbanized Area.

³ *Id.*

⁴ *See Faye & Richard Tuck*, 3 FCC Rcd 5374 (1988).

⁵ *See generally Moscow, Post Falls, Troy, Idaho*, 14 FCC Rcd 17012 (Allocations Branch 1999); *Boulder and Lafayette, Colorado*, 12 FCC Rcd 583 (Allocations Branch 1997).

⁶ The FM allotment criteria are as follows: (1) first aural service; (2) second aural service; (3) first local service; and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 92 (1982).

II. The Bureau’s Current Allotment Policy With Respect to Changes in Community of License Is Inconsistent With Section 307(b) of the Act, As Interpreted By *Huntington, Tuck* and *KFRC*.

In applying Section 1.420(i) of the Commission’s rules, the Bureau has essentially ignored Section 307(b) of the Act, as well as the D.C. Circuit’s decision in *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir. 1951), and the full Commission’s decisions in *Tuck* and *RKO General, Inc. (KFRC)*, 5 FCC Rcd 3222 (1990) (“*KFRC*”).

A. Section 307(b) Precedent.

Huntington, Tuck, and *KFRC* all involved competing applications for new AM stations. In *Huntington*, one of the applicants proposed Los Angeles as its community of license, and another applicant proposed the suburban community of Huntington Park. The center of Huntington Park was only six miles from the center of Los Angeles. Both applicants proposed technical facilities that would cover substantially all of the Los Angeles metropolitan area, including Huntington Park. 192 F.2d at 35. Although the court found that Huntington Park was “an independent municipality with a population slightly less than 30,000,” having its own civic, social, religious, educational, and government organizations (*id.* at 34), the court nevertheless affirmed the Commission’s determination not to award a Section 307(b) preference to the Huntington Park applicant.⁷ Specifically, the court concluded that the issue was not which of the two communities showed a greater need for a new AM station, but, rather, which of the two applicants would better serve the larger Los Angeles metropolitan area that both intended to cover. *Id.* at 35.

⁷ In refusing to award a Section 307(b) preference, the Commission recognized that the community of Huntington Park “might well be entitled to” a local radio service, rather than the regional facility which the applicant had proposed. *See* 192 F.2d at 34-35.

In *Tuck*, the Commission attempted to clarify the scope of *Huntington*, and established three criteria for determining whether to award a first local service preference.⁸ The Commission applied these criteria in *KFRC*, and, as discussed below, determined that the community of Richmond, California, was not entitled to a Section 307(b) preference over the larger central city of San Francisco. 5 FCC Rcd 3222 (1990).

The city of Richmond is located within the San Francisco-Oakland Urbanized Area, and had a population of 74,676. 5 FCC Rcd at 3222. Richmond is not contiguous with San Francisco, however, because it is located 16 miles northeast of San Francisco, across the San Francisco Bay.⁹ Richmond is an incorporated community with its own city council-city manager government. The Review Board found that the city of Richmond provided numerous municipal services, was part of the Richmond Unified School District, and had a city budget of \$117.6 million in 1984-85.¹⁰

Richmond had a workforce of 28,739 persons, of which 8,940 (31%) worked in Richmond, and only 2,966 (approximately 10%) worked in San Francisco. *Id.* Richmond had numerous cultural and recreational facilities, churches, medical facilities, civic, and other organizations.¹¹ Although

⁸ The three criteria are (1) signal population coverage (*i.e.*, the degree to which a station would provide coverage not only to the suburban community, but to the adjacent metropolitan area as well); (2) the size and proximity of the suburban community relative to the larger central city; and (3) the interdependence of the suburban community with the central city, as determined by analyzing eight separate factors. *See Tuck*, 3 FCC Rcd at 5377-78.

⁹ *Id.*; *see also* 4 FCC Rcd 4997, 5000 ¶17 (Rev. Bd. 1989).

¹⁰ *See* 4 FCC Rcd at 4999 ¶11.

¹¹ *See* 5 FCC Rcd at 3222-23.

Richmond did not have its own daily newspaper, it did have a weekly shopper.¹² Richmond telephone numbers were listed in a separate phone directory, and calls to both San Francisco and Oakland were toll calls. *Id.* at 3223. Richmond's retail sales for 1984 were approximately \$600 million. *Id.*

Despite the facts outlined above which suggest that Richmond is a vital, independent community unto itself, the Commission concluded that a grant of a Section 307(b) preference to the community of Richmond would "produce an anomalous result." *Id.* The Commission stated:

[W]e are concerned that a failure to deal realistically with the relationship between Richmond and the metropolitan area and the coverage proposed by the applicants might appear to condone an artificial and unwarranted manipulation of the Commission's policies.

Id. The Commission concluded that the first two of the *Tuck* criteria "strongly favor[ed] applying *Huntington* and not giving a Section 307(b) preference to the Richmond applicants." *Id.* Specifically, the Commission found that the technical proposals of the Richmond applicants were substantially similar to those of the San Francisco applicants, and would serve not only the entire Bay Area, but a much larger area as well. With respect to the size/proximity criterion, the Commission noted that Richmond was 1/9th the size of San Francisco, and was located "only 16 miles away." *Id.* Under the third (independent-interdependent) criterion,¹³ the Commission

¹² Richmond was served by a daily newspaper published in Pinole, another city in Contra Costa County, in which Richmond is located. *Id.* at 3223. San Francisco is located in San Francisco County, and Oakland is located in Alameda County.

¹³ The Commission's analysis of the eight interdependent factors will be discussed in greater detail below in connection with the Bureau's decision in *Pleasanton, Bandera, Hondo, and Schertz, Texas*, 15 FCC Rcd 3068 (Allocations Branch 2000).

determined that the evidence did not establish that Richmond was independent of the central cities of the San Francisco-Oakland metropolitan area. *Id.*

B. The Bureau's Current Policy Regarding Changes in Community of License.

The Section 307(b) analysis set forth in the D.C. Circuit's decision in *Huntington* and the full Commission's decision in *KFRC* is in sharp contrast to the Bureau's current policy in FM allotment cases involving a change in a station's community of license. For example, in *Headland, Alabama, and Chattahoochee, Florida*, 10 FCC Rcd 10352 (Allocations Branch 1995), the Bureau found that the proposed reallocation of a station from Headland to Chattahoochee would provide a city-grade signal over both Headland and the larger central city of Dothan, Alabama. *Id.* at 10355. With respect to the size and proximity of the two communities, Dothan had a population of 53,589, whereas Headland had a population of only 3,266. *Id.* Thus, Headland was less than 1/16th the size of Dothan. The centers of the two communities were located only eight miles apart, and in one area the city limits were only one mile apart. *Id.* Nevertheless, in applying the *Tuck* criteria, the Bureau concluded that Headland was sufficiently independent from Dothan that the reallocation proposal would provide a first local service.¹⁴ *Id.*

Similarly, in *Clovis and Madera, California*, 11 FCC Rcd 5219 (Allocations Branch 1996), the Bureau granted a proposal to move a station from Madera to Clovis, despite the fact that Clovis is located entirely within the Fresno Urbanized Area. Clovis had a population of only 50,323, which was 1/7th the size of Fresno. The station also would place a city-grade signal over 75% of the

¹⁴ The Bureau stated that "only a moderate degree of interdependence between Headland and Dothan has been presented, while most of the evidence presented shows independence or a mixed finding." *Id.* at ¶15.

Fresno Urbanized Area. Under the third *Tuck* criterion, however, the Bureau concluded that Clovis was a separate and independent community from the larger city of Fresno.

A further example of the Bureau's current allotment policy with respect to changing a station's community of license is reflected in *Schertz*.¹⁵ *Schertz* involved a proposal to reallocate a station from Pleasanton to Schertz, Texas. Schertz is a community of 14,014 persons, which is partially within the San Antonio Urbanized Area. The reallocation proposal would enable the station to provide a city-grade signal to 99% of the San Antonio Urbanized Area.¹⁶ With respect to the size and proximity of Schertz to San Antonio, the two communities are separated by a distance of approximately 16 miles,¹⁷ and Schertz is 1/67th the size of San Antonio. Despite the first two *Tuck* criteria, which strongly suggest that Schertz is interdependent with San Antonio, the Bureau concluded that because, in its view, the proponent satisfied a majority of the eight independent-interdependent factors, this was sufficient to demonstrate Schertz's independence from the larger central city.¹⁸

C. The Bureau's Application of Section 1.420(i) of the Commission's Rules and the *Tuck* Criteria Has Been Inconsistent With Section 307(b), *Huntington*, and *KFRC*.

A good illustration of how far the Bureau's policy in allotment rulemaking proceedings has departed from Section 307(b), *Huntington*, and *KFRC* is reflected by comparing the Bureau's

¹⁵ *Pleasanton, Bandera, Hondo, and Schertz, Texas*, 15 FCC Rcd 3068 (Allocations Branch 2000) ("*Schertz*").

¹⁶ *Id.* at 3069 ¶4.

¹⁷ In its Report and Order granting the reallocation proposal, the Bureau did not address the fact that Schertz and San Antonio were located only 16 miles apart, which is the same distance between San Francisco and Richmond in *KFRC*. See 5 FCC Rcd at 3223 ¶12.

¹⁸ *Id.* at 3071 ¶9.

application of the *Tuck* criteria in *Schertz* with the full Commission's analysis in *KFRC*. Under the first criterion, signal population coverage, the Richmond applicant presented a technical proposal that was identical to those of the San Francisco applicants. As stated above, the proposed Richmond station would serve not only the entire Bay Area, but a much larger area as well.¹⁹ In *Schertz*, the proposed city-grade signal would cover 99% of the San Antonio Urbanized Area.²⁰ Therefore, just as in *KFRC*, the first criterion indicated that *Huntington* should apply and that *Schertz* should not receive a first local service preference.²¹

With respect to the size and proximity criterion, the Review Board found that Richmond was the second largest city in Contra Costa County, with a population of 74,676. It is located 16 miles northeast of San Francisco, on the eastern banks of the San Francisco and San Pablo Bays. The city of Richmond itself covered an area of 53 square miles.²² Moreover, there is no direct link across San Francisco Bay between San Francisco and Richmond. To travel from Richmond to San Francisco by car, it is necessary to first cross the Richmond-San Rafael Bridge into San Rafael, the county seat of Marin County, and then proceed over the Golden Gate Bridge to San Francisco. *Id.* An alternative means of driving from Richmond to San Francisco is to go through Oakland and then take the San Francisco-Oakland Bay Bridge. *Id.* In either case, the cities of Richmond and San Francisco are not contiguous. Moreover, Richmond was 1/9th the size of San Francisco.

¹⁹ See 5 FCC Rcd at 3223 ¶12.

²⁰ See 15 FCC Rcd at 3071 ¶8.

²¹ See *KFRC*, 5 FCC Rcd at 3223 ¶12.

²² See *KFRC*, 4 FCC Rcd 4997, 4999 ¶9 (Rev. Bd. 1989).

As stated above, in *Schertz*, the Bureau did not even address the distance between Schertz and San Antonio. Like Richmond, Schertz is approximately 16 miles from San Antonio, and is located partially within the San Antonio Urbanized Area. Moreover, Schertz is approximately 1/67th the size of San Antonio.²³ Thus, the second *Tuck* criterion also “strongly favored” applying *Huntington* and not awarding Schertz a first local service preference.²⁴

There are also substantial factual similarities between Richmond and Schertz with respect to the third *Tuck* criterion and its eight independent-interdependent factors.²⁵ Nevertheless, the full Commission and the Bureau again reached substantially different results. For example, with respect to the second factor, Richmond did not have its own daily newspaper, but received the *West County Times*, a daily newspaper published in Pinole, another community in Contra Costa County.²⁶ Although headquartered in Pinole, the newspaper had a circulation office and reporters in Richmond.

²³ See 15 FCC Rcd at 3069 ¶4. Based on the 1990 U.S. Census, San Antonio has a population of 935,933.

²⁴ See *KFRC*, 5 FCC Rcd at 3223 ¶12.

²⁵ The eight *Tuck* interdependent factors include the following: (1) the extent to which community residents work in the larger metropolitan area, rather than the specified community; (2) whether the smaller community has its own newspaper or other media that cover the community’s local needs and interests; (3) whether community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area; (4) whether the specified community has its own local government and elected officials; (5) whether the smaller community has its own telephone book or zip code; (6) whether the community has its own commercial establishments, health facilities, and transportation systems; (7) the extent to which the specified community and the central city are part of the same advertising market; and (8) the extent to which the specified community relies on the larger metropolitan area for various municipal services such as police, fire protection, schools and libraries. See *Tuck*, 3 FCC Rcd at 5378.

²⁶ Contra Costa County had a population of 656,380. Richmond was the second largest city in the county with a population of 74,676. See 4 FCC Rcd at 4999 ¶9.

Richmond also was served by its own weekly shopper, which was published in Richmond.²⁷ In reviewing the evidence under this factor, the Commission found it “significant” that Richmond did not have its own daily newspaper because the daily San Francisco *Examiner and Chronicle* had wide distribution throughout the Bay Area.²⁸

In *Schertz*, the Bureau took a markedly different approach. The only “newspaper” published in Schertz was a monthly newsletter. Although Schertz was served by *The Herald*, a weekly publication that covered all local activities, and the daily *Gazette-Enterprises*, neither of these newspapers were published in *Schertz*. The Bureau concluded, however, that because neither the weekly nor daily newspaper was published in San Antonio, this did not indicate interdependence between Schertz and San Antonio. Instead, the Bureau concluded that Schertz’s monthly newsletter “in conjunction with the other papers minimally satisfies this criterion.”²⁹ The Bureau’s analysis failed to recognize that Richmond, like Schertz, was served by a daily newspaper published in another community outside the larger central city, and that, just as in *KFRC*, the *San Antonio Express-News* undoubtedly also enjoys wide distribution in Schertz, which is partially within the San Antonio Urbanized Area. Unlike the full Commission, however, the Bureau did not attribute any significance to the fact that Schertz did not have its own daily newspaper.

Similarly, under factor 3 in *KFRC*, the Executive Vice President of the Richmond Chamber of Commerce testified that Richmond needed its own radio station because it was an independent

²⁷ See 4 FCC Rcd at 4999.

²⁸ See 5 FCC Rcd at 3224 ¶17.

²⁹ See 15 FCC Rcd at 3071 ¶9.

community whose governmental activities received little coverage by Bay Area radio stations.³⁰ Nevertheless, the Commission found this evidence insufficient to support a finding of independence. In *Schertz*, however, the proponent showed that a number of businesses include the word “Schertz” in their names. In addition, the Schertz City Secretary provided a declaration stating that the city government perceives itself as an autonomous community from San Antonio. Although the proponent’s position under factor 3 was supported only by one letter from a city official, the Bureau concluded that the proponent had presented a “satisfactory showing with sufficient documentation.”³¹ Inexplicably, however, the Bureau rejected a series of letters showing that Schertz and San Antonio were interdependent because, according to the Bureau, “they [did] not address or establish a majority of the *Tuck* factors.” *Id.* The Bureau’s analysis under factor 3 in *Schertz* cannot be reconciled with the full Commission’s analysis in *KFRC*.

There also are similar inconsistencies under factors 5 and 6. Under factor 5, the telephone numbers for Richmond were listed in the West Contra Costa County telephone directory, and all telephone calls either to or from San Francisco or Oakland were toll calls.³² The Commission found it “significant,” however, that Richmond did not have its own local telephone directory.³³ In *Schertz*, on the other hand, the Bureau noted that Schertz has one zip code, a post office, and is served by a

³⁰ See 4 FCC Rcd at 4999 ¶12.

³¹ See 15 FCC Rcd at 3071 ¶9.

³² See 4 FCC Rcd at 4999 ¶12.

³³ See 5 FCC Rcd at 3224 ¶17.

telephone directory “separate from San Antonio.” The Bureau found these facts sufficient to support a finding of independence.³⁴

Similarly, with respect to factor 6, in *KFRC*, the Review Board noted that Richmond has “many local medical facilities,” two of which included a private hospital and a small public hospital. The Commission noted, however, that Richmond did not have “a major public hospital, and therefore found that the evidence under this factor was “mixed.”³⁵ In *Schertz*, the record reflected that Schertz did not have its own hospital, but did have a medical clinic, dentists, and a veterinary clinic. Despite the “many local medical facilities” in Richmond, and the Commission’s “mixed” finding under this factor, the Bureau found the limited medical facilities in Schertz sufficient to support a finding of independence.³⁶

As demonstrated above, under the first two *Tuck* criteria, the facts in *Schertz* warrant applying *Huntington* even more so than in *KFRC*. Moreover, the reallocation proponent in *Schertz* failed to establish independence between Schertz and San Antonio under both factor 1 (extent to which Schertz residents work in the larger metropolitan area, rather than the specified community) and factor 7 (extent to which Schertz and San Antonio are part of the same advertising market). The analysis of factors 2, 3, 5 and 6 outlined above makes abundantly clear that if the Bureau had analyzed those factors in the same manner as the full Commission in *KFRC*, the third *Tuck* criterion also would have resulted in a finding that Schertz is interdependent with San Antonio, and, thus, did not warrant a first local service preference.

³⁴ See 15 FCC Rcd at 3072 ¶9.

³⁵ See 5 FCC Rcd at 3224 ¶18.

³⁶ See 15 FCC Rcd at 3072 ¶9.

The above comparison between the full Commission's *Tuck* analysis in *KFRC* and the Bureau's application of the same criteria in *Schertz* is not the first time the FCC's policy regarding the assignment of station licenses to communities near urban areas has been less than consistent. In *New Radio Corp.*, 804 F.2d 756, 762 (D.C. Cir. 1986), the D.C. Circuit stated that the Commission's policy regarding the assignment of licenses to communities in metropolitan areas "once again appears to be in a state of confusion." The court was making reference to the Commission's statement (in affirming an order denying an application for a new AM station in the Los Angeles metropolitan area) that, even if the applicant had raised the *Huntington* issue in a timely manner, the *Huntington* exception would not have applied because "Orange is a separate community with its own need for a first transmission service." *See Id.* at 762. Although the court affirmed the Commission's order, the court specifically noted that the Commission's terse dismissal of the *Huntington* issue could not be reconciled with other FCC cases in which the Commission expressly recognized that a city can be "a cognizable community with local needs and interests," but, at the same time, "be so integrally related to neighboring communities as to be part of a single larger community for Section 307(b) purposes."³⁷ *Id.* (citations omitted).

³⁷ *See also Arizona Number One Radio, Inc.*, 2 FCC Rcd 44 (1987), *aff'd mem. sub nom. Interstate Broadcasting System v. FCC*, 836 F.2d 1408 (D.C. Cir. 1988) (Commission applied *Huntington* in part because (i) the available frequency was a high-powered Class C FM channel "expressly intended for regional rather than local use"; (ii) most of the applicants would place a city-grade signal over the entire Phoenix metropolitan area; and (iii) neither Glendale nor Peoria, Arizona, had a hospital or separate train or bus service).

III. The Bureau Should Apply Section 1.420(i) of the Commission's Rules In a Manner Consistent With Section 307(b), and Not Blindly Apply the Allotment Criteria and Permit the Commission's Section 307(b) Policies to be Artificially Manipulated.

In *National Association of Broadcasters v. FCC*, 740 F.2d 1190 (D.C. Cir. 1984), the court specifically rejected the NAB's contention that Section 307(b) requires that broadcast licenses be "distributed" among "states" and "communities," and that the statute mandates a system of only local broadcast licensing and service.³⁸ *Id.* at 1198. In refusing to impute such a narrow view to the statutory provision, the court concluded that the FCC's paramount responsibility is to achieve a "fair, efficient and equitable distribution of radio service" *Id.*, quoting 47 U.S.C. §151. The court further stated that "[t]he ultimate touchstone for the FCC is thus the distribution of *service*, rather than of licenses or stations; the constituency to be served is people, not municipalities." *Id.* (emphasis added).

Moreover, in *Tuck*, the Commission recognized that:

[I]t would be naive for us to ignore that granting a dispositive preference to an applicant proposing a first local transmission service near a metropolitan center, without regard to the efficiency of the applicant's proposed use of the spectrum, has the potential to produce anomalous results that would seem to contravene the original statutory mandate of section 307(b)

Tuck, 3 FCC Rcd at 5374.

³⁸ Section 307(b) states as follows:

In considering applications for licenses . . . the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

47 U.S.C. §307(b).

Similarly, in adopting Section 1.420(i) of the rules, the Commission noted that it would be appropriate to consider whether a given reallocation proposal would result in shifting service from an underserved rural to a well-served urban area, and the public interest consequences of any such change.³⁹ The Commission stated that, consistent with its precedent, it did not “intend to apply the first local service preference of its allotment criteria blindly.” *Id.* The Commission also stated:

We have consistently given little or no weight to claimed first local service preferences if, given the facts and circumstances, the grant of a preference would appear to allow an artificial or purely technical manipulation of the Commission’s 307(b) related policies.

Id. (footnote omitted).

In order to fulfill the Commission’s statutory mandate under Section 307(b), the Bureau should attempt to achieve a fair, efficient and equitable distribution of radio service, rather than the distribution of licenses to particular communities. *NAB v. FCC*, 740 F.2d 1190. Moreover, to ensure that the Commission’s Section 307(b) policies are not artificially manipulated in this case, the Bureau should review T&J’s reallocation proposal pursuant to the criteria established in *Tuck*, and apply that criteria in a manner consistent with Section 307(b), *Huntington*, and *KFRC*.

IV. T&J Has Failed to Establish that Barnesville is Independent of the Fargo-Moorhead Urbanized Area.

A. Tuck Criteria.

With respect to the first *Tuck* criterion (signal population coverage), Station KRVI presently covers 53.6% of the Fargo-Moorhead Urbanized Area from its existing transmitter site, which is

³⁹ See *Amendment of the Commission’s Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd 7094, 7096 (1990) (reconsideration order) (“*Community of License*”).

located approximately 10 miles east of Barnesville.⁴⁰ From its proposed transmitter site located approximately 20 miles northwest of Barnesville -- and approximately one mile outside the Fargo-Moorhead Urbanized Area -- Station KRVI will place a city-grade signal over the entire Fargo-Moorhead Urbanized Area.⁴¹ Thus, because T&J's reallocation proposal would result in Station KRVI covering substantially the same area and population as those radio stations licensed to either Fargo or Moorhead, the first *Tuck* criterion strongly suggests that *Huntington* should be applied to its reallocation proposal.

Under the second criterion (size and proximity to the central city), Barnesville is 25 miles from Fargo and 23 miles from Moorhead. Barnesville has a 1990 U.S. Census population of 2,066, whereas the populations of Fargo and Moorhead are 74,111 and 32,295, respectively. Thus, Barnesville is 1/36th (2.8%) the size of Fargo, and less than 1/15th (6.4%) the size of Moorhead. More importantly, Barnesville is less than 1/50th (1.9%) the size of the combined central communities. Although Barnesville is slightly further outside the central city (Fargo-Moorhead) than Richmond was in *KFRC* ("only 16 miles away"), the substantial disparity in size between Barnesville and Fargo-Moorhead strongly suggests that Barnesville is interdependent with the larger central cities.⁴²

⁴⁰ See Appendix A, p. 3 and Fig. 1.2.

⁴¹ *Id.* T&J states that because Station KRVI will cover more than 50% of the Urbanized Area, there is a "presumption of interdependence" between Barnesville and the Fargo-Moorhead Urbanized Area. See Petition, p. 5.

⁴² *Cf. KFRC*, 5 FCC Rcd at 3223 (Commission found Richmond to be interdependent even though it is not contiguous to either San Francisco or Oakland, is located 16 miles away from San Francisco, and was 1/9th the size of San Francisco).

With respect to the third *Tuck* criterion and its eight independent-interdependent factors, the evidence fails to establish that Barnesville is independent of the Fargo-Moorhead Urbanized Area. Under the factor 1 (extent to which community residents work in the larger metropolitan area, rather than the specified community), T&J claims that there are an “abundance of businesses that exist in Barnesville” and that residents have the option of working in the community.⁴³ However, T&J failed to satisfy the Commission’s general requirement of establishing that a majority of the Barnesville residents work in the local community.⁴⁴ Indeed, according to data compiled by the Minnesota Department of Trade & Economic Development, Clay County (in which Barnesville is located) has a workforce of 29,152 persons, but only 367 of those persons are employed in Barnesville.⁴⁵ Moreover, according to U.S. Census data, 45.7% of the residents of Clay County work outside of the county, and the average commuting time for Clay County residents is 15.4 minutes.⁴⁶ Furthermore, a study conducted by the Small Business Institute at Moorhead State University in

⁴³ See Petition, p. 6.

⁴⁴ See *Schertz*, 15 FCC Rcd at 3071 ¶9.

⁴⁵ See Petition, Exhibit D, pp. 1-2. Contrary to the representation contained in Exhibit D, p. 1, of T&J’s Petition, Clay County is located within the Fargo-Moorhead MSA. See *State and Metropolitan Area Data Book*, U.S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census, p. 117 (1991) (copy of relevant page contained in Appendix B hereto).

⁴⁶ See *County and City Data Book*, U.S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census, p. 277 (1994) (copy of relevant page contained in Appendix C hereto).

1992 indicated that approximately 65% of the “working class” in Barnesville commute to the Fargo-Moorhead area where they also do their shopping.⁴⁷

In light of the above facts, the record reflects that a majority of the Barnesville workforce are employed outside the specified community and commute to the Fargo-Moorhead area. Therefore, the evidence under factor 1 strongly suggests that Barnesville is interdependent with the Fargo-Moorhead Urbanized Area.

Under factor 2 (whether the specified community has its own newspaper or other media that cover the community’s local needs and interests), Barnesville has its own weekly newspaper, the Barnesville *Record-Review*. According to the newspaper’s staff, only 460 papers are distributed in Barnesville each week. The daily newspaper in Fargo, *The Forum*, has substantial circulation in Clay County.⁴⁸ According to Mark Glaser, the Fargo newspaper’s District Manager for Clay County, *The Forum* had the following circulation in Barnesville in April 2000: (i) home delivery subscribers - 338 daily plus an additional 400 Sunday-only subscribers; and (ii) single copies (purchased from news stands, grocery stores, etc.) - 75 daily plus an additional 400 on Sundays. Thus, on a weekly basis, *The Forum* sells 2,478 (6 x 413) daily newspapers in Barnesville, and 800 Sunday newspapers, for a total weekly circulation of 3,278 in Barnesville. Out of the total 3,738 (3,278 + 460 (Barnesville weekly)) newspapers distributed in Barnesville each week, only 12.3% of the newspapers are published in Barnesville. The remaining 87.7% are published in Fargo.

⁴⁷ See “Attitudes Towards Shopping in Downtown Barnesville,” Moorhead State University Small Business Institute, February 24, 1992 (“SBI Study”) (see Appendix D, p. 8).

⁴⁸ *The Forum* has a Monday-Saturday circulation of 51,207, and a Sunday circulation of 65,345. *Editor & Publisher Yearbook*, p. I-327 (79th ed.) (1999).

In *KFRC*, the Commission found it “significant” that Richmond did not have its own daily newspaper, particularly because the San Francisco daily newspaper had wide distribution throughout the Bay Area. In this case, just as in *KFRC*, the distribution of the local community’s weekly newspaper is minimal compared to the distribution of the daily newspaper published in the larger Urbanized Area. Thus, just as in *KFRC*, the evidence under factor 2 also suggests that Barnesville is interdependent with the larger central cities.

With respect to the third factor (whether community leaders and residents perceive the specified community as being separate from the larger metropolitan area), T&J did not produce even one statement from a community leader in Barnesville or resident of the community stating that they perceive Barnesville to be separate from the larger Fargo-Moorhead area. Instead, T&J relies upon vague references to community events and Barnesville’s limited commercial establishments and social organizations to meet this criterion.⁴⁹ However, participation in local community events and social organizations by Barnesville residents does not indicate that community leaders or residents perceive Barnesville to be separate from the larger Fargo-Moorhead Urbanized Area. Indeed, although residents of Arlington, Virginia, may attend an annual parade or other charitable event in different areas of the Arlington community (*e.g.*, Rosslyn, Clarendon, Court House, etc.), such participation in community events falls far short of establishing that Arlington residents *perceive* the Arlington community to be separate from, and independent of, the Washington, D.C. Urbanized Area.

Moreover, T&J’s reference to Barnesville’s few businesses is more appropriately considered under factor 6 (whether the community has its own commercial establishments, etc.), rather than

⁴⁹ See Petition, p. 7.