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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL

In the Matter of	)	
	)	
Amendment of Section 73.202(b)	)	
Table of Allotments,	)	MM Docket No. 01-62
FM Broadcast Stations.	)	RM-10053
(Ardmore, Brilliant, Gadsden, Moundville	)	
Pleasant Grove, Scottsboro, Trussville	)	
Tuscaloosa and Winfield, Alabama, Columbus	)	
and Okolona, Mississippi, McMinnville,	)	
Pulaski and Walden, Tennessee)	)	

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To: Chief, Allocations Branch
Stop Code 1800D5

REPLY COMMENTS
OF
COX RADIO, INC.

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SUMMARY

Pursuant to the *Notice of Proposed Rule Making* in MM Docket No. 01-62 and in response to the Comments and Amended Proposal submitted by Capstar TX Limited Partnership, Jacor Licensee of Louisville II, Inc., and Clear Channel Broadcasting Licenses, Inc. (collectively, "Petitioners"), Cox Radio, Inc. ("Cox") opposes the proposal to reallocate WENN(FM) to Hoover, Alabama, on Channel 288C2. The Commission must deny the proposal because it is short-spaced to currently licensed facilities and is contingent upon final approval of a construction permit and license for WYAI(FM) to operate on Channel 287C1 at a new site. The Commission should instead grant Cox's mutually exclusive proposal to allot Channel 288A to Springville, Alabama, as its first local service.

Cox also opposes Petitioners' proposal to reallocate WRTR(FM) to Brookwood, Alabama, on Channel 290C3. The Commission should deny the proposal because Brookwood is interdependent upon the Tuscaloosa Urbanized Area and does not merit a first local service preference. Cox also opposes Petitioners' amended proposals to reallot WKXM-FM, Winfield, Alabama, from Channel 290A to Channel 249A and to downgrade WZHT(FM), Troy, Alabama, from Channel 289C to 289C0 due to the unacceptable losses of service that would result from these proposals.

Cox supports the Counterproposal filed by Southern Broadcasting, LLC, which proposes the allotment of Channel 279A to Derma, Mississippi, and the allotment of Channel 288A to Springville, Alabama, as a first local service.

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REPLY COMMENTS OF COX RADIO, INC.

Cox Radio, Inc. ("Cox"),[1] by its attorneys, hereby respectfully submits these reply comments pursuant to the Commission's *Notice of Proposed Rule Making* ("*Notice*") in the above-captioned proceeding.[2] The *Notice* proposes eight interrelated proposals affecting allotments in communities located in Alabama, Mississippi, and Tennessee pursuant to a Petition for Rule Making ("Petition") submitted by Capstar TX Limited Partnership ("Capstar") and Jacor Licensee of Louisville II, Inc. ("Jacor"). On April 24, 2001, Cox submitted its Comments

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[1] Through a wholly-owned subsidiary, Cox is the licensee of seven radio stations in the Birmingham market.

[2] Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Ardmore, Brilliant, Gadsden, Moundville, Pleasant Grove, Scottsboro, Trussville Tuscaloosa and Winfield, Alabama, Columbus and Okolona, Mississippi, McMinnville, Pulaski and Walden, Tennessee), *Notice of Proposed Rule Making*, DA 01-563, MM Docket No. 01-62, RM-10053 (rel. Mar. 2, 2001) ("*Notice*").

and Counterproposal proposing the allotment of Channel 288A to Springville, Alabama, as its first local service, and opposing Capstar's and Jacor's proposal to reallot Channel 290A from Winfield to Brilliant, Alabama.[3] On April 24, 2001, Capstar, Jacor and Clear Channel Broadcasting Licenses, Inc. ("Clear Channel") (collectively, "Petitioners") submitted their Comments and Amended Proposal ("Amended Proposal"), which amended certain proposals in the original Petition.[4]

By these reply comments, Cox opposes Petitioners' amended proposal to upgrade WENN(FM) from Channel 290A to Channel 288C2 and to reallocate WENN(FM) to Hoover, Alabama, which is mutually exclusive with the Springville Proposal. As discussed herein, the Commission must deny the Hoover Proposal because it is short-spaced to currently licensed facilities and is contingent upon final approval of a construction permit and license for WYAI(FM), Bowdon, Georgia to operate on Channel 287C1 at a new site. In light of the technical deficiency of the Hoover Proposal, the Commission should grant the Springville Proposal, which is technically compliant and can be implemented immediately.

Cox opposes Petitioners' amended proposal to upgrade WRTR(FM) from Channel 288A to Channel 290C3 and to reallocate WRTR(FM) to Brookwood, Alabama. Brookwood is

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[3] Comments and Counterproposal of Cox Radio, Inc. filed April 24, 2001, Amendment of Section 73.202(b) Table of Allotments, FM Broadcast Stations (Ardmore, Brilliant, Gadsden, Moundville, Pleasant Grove, Scottsboro, Trussville, Tuscaloosa and Winfield, Alabama, Columbus and Okolona, Mississippi, McMinnville, Pulaski and Walden, Tennessee), MM Docket No. 01-62, RM-10053 ("Cox's Comments and Counterproposal").

[4] Comments and Amended Proposal of Capstar TX Limited Partnership, Jacor Licensee of Louisville II, Inc., and Clear Channel Broadcasting Licenses, Inc filed April 24, 2001, Amendment of Section 73.202(b) Table of Allotments, FM Broadcast Stations (Ardmore, Brilliant, Gadsden, Moundville, Pleasant Grove, Scottsboro, Trussville, Tuscaloosa and Winfield, Alabama, Columbus and Okolona, Mississippi, McMinnville, Pulaski and Walden, Tennessee), MM Docket No. 01-62, RM-10053 ("Amended Proposal").

interdependent upon the Tuscaloosa Urbanized Area and as such, does not merit a first local service preference. Accordingly, the Commission should deny this proposal because the public interest weighs in favor of the retention of WRTR(FM) at Tuscaloosa. Cox also opposes Petitioners' amended proposals to reallot WKXM-FM, Winfield, Alabama, from Channel 290A to Channel 249A and to downgrade WZHT(FM), Troy, Alabama, from Channel 289C to 289C0 due to the unacceptable losses of service that would result from the proposals.

By these reply comments, Cox also supports the Counterproposal filed by Southern Broadcasting, LLC ("Southern Broadcasting Counterproposal"),[5] which proposes the allotment of Channel 279A to Derma, Mississippi, as its first local service and the allotment of Channel 288A to Springville, Alabama, as its first local service.

I. THE COMMISSION SHOULD GRANT THE SPRINGVILLE PROPOSAL TO THE EXCLUSION OF THE HOOVER PROPOSAL BECAUSE THE SPRINGVILLE PROPOSAL WOULD BETTER SERVE THE PUBLIC INTEREST.

Petitioners' Comments and Amended Proposal alternatively proposed the upgrade of WENN(FM) from Channel 290A to Channel 288C2 and the reallocation of WENN(FM) to Hoover, Alabama (the "Hoover Proposal"). The Hoover Proposal replaces the proposal to substitute Channel 288C3 for Channel 290A at Trussville, Alabama; reallot Channel 288C3 to Pleasant Grove; and modify Station WENN(FM)'s license to specify operation on Channel

[5] Counterproposal filed by Southern Broadcasting, LLC on April 24, 2001, Amendment of Section 73.202(b) Table of Allotments, FM Broadcast Stations (Ardmore, Brilliant, Gadsden, Moundville, Pleasant Grove, Scottsboro, Trussville, Tuscaloosa and Winfield, Alabama, Columbus and Okolona, Mississippi, McMinnville, Pulaski and Walden, Tennessee), MM Docket No. 01-62, RM-10053 ("Southern Broadcasting Counterproposal").

288C3 at Pleasant Grove, Alabama (the "Pleasant Grove Proposal").[6] The Springville Proposal proposed in Cox's Comments and Counterproposal is mutually exclusive with the Hoover Proposal as well as the Pleasant Grove Proposal.

A. The Commission Must Reject The Hoover Proposal Because It Is Short-Spaced To Licensed Facilities And Its Technical Compliance Is Contingent On The Future Licensing Of WYAI(FM) On Channel 287C1 At A New Site.

The Commission must reject the Hoover Proposal because it violates the Commission's rules regarding minimum distance separations from licensed facilities and is contingent upon the licensing of another station on a new channel at specific coordinates in order to comply with the Commission's technical rules. In the Hoover Proposal, Petitioners propose to upgrade WENN(FM) from Channel 290A to Channel 288C2 and to reallocate WENN(FM) from Trussville to Hoover, Alabama. Petitioners fail to mention, however, that the Hoover Proposal is short-spaced to the currently licensed facilities of WYAI(FM), Bowdon, Georgia, owned by an affiliate of Petitioners.[7] Indeed, the Commission's rules state that the "Commission will not accept petitions to amend the Table of Allotments unless the reference points meet all of the minimum distance separation requirements."[8] The technical compliance of the Hoover Proposal instead is contingent on the future relocation and licensing of WYAI(FM) on Channel 287C1 at the coordinates specified in either WYAI(FM)'s current construction permit (FCC File No. BPH-20000131ACC) or its recently filed, pending application specifying a new tower site for this

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[6] To the extent that the Commission decides to consider the Pleasant Grove Proposal, Cox remains opposed to the Pleasant Grove Proposal for the reasons set forth in its Comments and Counterproposal.

[7] Exhibit A (Technical Exhibit of du Treil, Lundin & Rackley, Inc.).

[8] 47 C.F.R. § 73.207 (2000). *See also* Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Saranac Lake and Westport, New York), *Report and Order*, 15 FCC Rcd 10325 (2000) (stating that the Commission will not grant proposals resulting in short-spaced allotments).

station's upgraded facilities (FCC File No. BMPH-20010424AAM). Petitioners, however, may not rely on the reference points of as-yet unlicensed facilities to ensure that the Hoover Proposal complies with the Commission's short-spacing rules. The Commission considers such a proposal to be a contingent proposal that cannot be granted.[9]

In a very similar case, the Commission rejected an allotment proposal that was contingent on a future authorization in order to comply with the minimum distance rules. In *Cut and Shoot*, Ben Walker Broadcasting, Inc. proposed an allotment that was short-spaced to the licensed site of Station KYKR(FM) but was fully spaced to an outstanding construction permit for KYKR(FM). The Commission rejected the proposal as technically deficient and stated that it would not process the contingent proposal. As the Commission explained:

> Processing petitions for rule making which would rely on other events by third parties to effect the compliance of the proposal with the separation requirements is not conducive to the efficient transaction of Commission business and imposes unnecessary burdens on the administrative resources of both the Allocations Branch and the Audio Services Division. Specifically, the facilities set forth in some outstanding construction permits are never built and licensed. If a Notice of Proposed Rule Making has

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[9] As the Commission has stated, "Our policy is not to accept proposals that are dependent or contingent upon finality of other actions or proceedings." Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Columbia City, Florida), *Report and Order*, 14 FCC Rcd 21165, ¶ 1 (1999). *See also, e.g.*, Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Tylertown, Mississippi), *Report and Order*, 13 FCC Rcd 739, ¶ 3 (1998) (rejecting a proposal because it is "contingent upon a favorable disposition" of another application); Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Carlisle, Irvine, and Morehead, Kentucky), *Report and Order*, 12 FCC Rcd 13181, ¶ 4 (1997) (stating that "Proposals and counterproposals are supposed to be capable of being effectuated at the time they are granted and cannot be contingent upon future actions. In this regard, since some authorized facilities are never built and licensed, we cannot assume that such facilities are in existence for the purpose of resolving related rulemaking matters"); Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Littlefield, Wolfforth and Tahoka, Texas), *Report and Order*, 12 FCC Rcd 3215, ¶ 7 (1997) (stating that "it is Commission policy not to accept a proposal that is contingent upon final approval of changes involving other broadcast facilities").

> been adopted and the construction permit subsequently canceled, the Audio Services Division must notify the Allocations Branch and the Allocations Branch must then dismiss the petition for rule making and terminate the proceeding. In such a situation, adopting a Notice of Proposed Rule Making, dismissing a petition for rule making, and terminating a proceeding all represent avoidable and unnecessary expenditures of resources. Also, this imposes an unfair burden on parties who have filed comments in that proceeding. Additionally, the facilities specified in still other construction permits are often not built and licensed in a timely manner. In turn, this would delay resolution of a rulemaking proceeding because the "contingent" construction permit is not yet licensed. We do not see any public interest benefit in such a delay. In this connection, the delay in adopting a Report and Order is unfair to other parties in the proceeding with proposals that are not contingent on the licensing of facilities set forth in an outstanding construction permit.[10]

The circumstances in *Cut and Shoot* are exactly the same as those underlying the Hoover Proposal. Like the proponent in *Cut and Shoot*, Petitioners rely on an outstanding construction permit for the Hoover Proposal to comply with the short-spacing rules. Yet, as the Commission stated, Petitioners may not "rely on other events...to effect the compliance of the proposal with the separation requirements."[11] As the Commission recognized, it would be precarious to grant a proposal that is contingent upon the future construction and licensing of other broadcast facilities. Indeed, the history of WYAI(FM)'s upgrade process illustrates the unpredictability of finalizing the relocation of broadcast facilities. WYAI(FM) first applied for and received a construction permit to operate on Channel 287C1 and to relocate the station to a new tower near

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[10] Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Cut and Shoot, Texas), *Memorandum Opinion and Order*, 11 FCC Rcd 16383, ¶ 4 (1996) ("*Cut and Shoot*"). *See also* Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Cloverdale, Montgomery, and Warrior, Alabama), *Memorandum Opinion and Order*, 15 FCC Rcd 11050, ¶ 4 (2000) (stating that the Commission "concur[s] in the policy adopted by the staff in *Cut and Shoot*").

[11] *Cut and Shoot*, 11 FCC Rcd 16383 at ¶ 4.

Newnan, Georgia (FCC File No. BPH-2000131ACC). This permit was contingent on two station downgrades for WAYS(FM) in Macon, Georgia, (FCC File No. BPH-2000131ACD) and WQSB(FM) in Albertville, Alabama (FCC File No. BPH-20000131ACK). To date, WYAI(FM) has not commenced construction of those facilities, much less submit a license application for this site, nor could it.[12] More recently, however, on April 24, 2001, WYAI(FM) filed an application to modify its construction permit requesting authorization for an alternate, unbuilt tower site (FCC File No. BMPH-20010424AAM). This application is still pending. When and if WYAI(FM) receives grant of its new authorization, any number of factors (*e.g.* FAA issues, zoning issues, unavailability of tower crews, construction delays, etc.) may delay the construction of the new tower and the upgraded facilities. With such rampant uncertainty regarding the future, the Hoover Proposal could hardly be considered to be a "slam dunk."[13]

Only after all the events that are necessary to license WYAI(FM) at its new coordinates on Channel 287C1 have occurred will the Hoover Proposal comply with the Commission's spacing rules. If the Commission were to grant the Hoover Proposal but WYAI(FM) does not become licensed at the specified reference points, the Commission would need to "undo" its decision in the rule making, resulting in unnecessary expenditures of the Commission's scarce resources. Moreover, awaiting compliance of the Hoover Proposal with the Commission's rules would result in unreasonable delay to this rule making and would be contrary to the public

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[12] The tower specified in the construction permit is owned by Cox Radio, Inc. The construction permit provides for an antenna height above average terrain of 371 meters, yet space on the tower at this height is not available. Thus, to construct facilities under this permit, Clear Channel would have to file yet another modification application requesting authority to locate its antenna at a different antenna height.

[13] According to Lee Reynolds, the engineer who prepared the Petitioners' Engineering Statement, "Hoover is a slam dunk." Exhibit B (Michael Tomberlin, *WENN seeks to move to Hoover*, THE BIRMINGHAM NEWS, May 8, 2001).

interest, particularly in light of the technical compliance of Cox's counterproposal for the allotment of Channel 288A to Springville.

B. The Springville Proposal Complies With The Technical Rules, Is Not Contingent On Any Future Actions And Thus Is Superior To The Hoover Proposal.

As stated, the Springville Proposal is superior to the Hoover Proposal because it is technically compliant with the Commission's rules and can be implemented immediately. Moreover, as stated in Cox's Comments and Counterproposal, the Town of Springville is a community deserving of first local aural service. Mayor Charles Griffin of Springville wholeheartedly supports Cox's proposal for a first aural service at Springville. Mayor Griffin declares, "Having a local radio station would be very beneficial and informational for our residents," and states on behalf of Springville that "We hope that this proposal will be looked upon favorably."[14] Cox also hopes that the Commission will look upon the Springville Proposal favorably and provide Springville with the opportunity to have its very first local radio station.

Upon the Commission's adoption of the counterproposal, Cox reconfirms that it will timely file an application for a construction permit for Channel 288A at Springville and construct and operate the station in accordance with applicable Commission rules. In light of the Hoover Proposal's short-spacing to licensed facilities and its contingency on future events, which render the Hoover Proposal ungrantable, Cox respectfully urges the Commission to grant the mutually exclusive Springville Proposal, which provides first local service, complies with the Commission's rules, and can be implemented immediately.

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[14] *See* Exhibit C (Letter from Mayor Charles Griffin of Springville, Alabama, to Federal Communications Commission dated May 7, 2001).

II. BROOKWOOD IS A DEPENDENT COMMUNITY FOR WHICH PETITIONERS ARE NOT ENTITLED TO A FIRST LOCAL SERVICE PREFERENCE.

Petitioners' Amended Proposal seeks to upgrade WRTR(FM) from Channel 288A to Channel 290C3 and to reallocate WRTR(FM) from Tuscaloosa to Brookwood, Alabama (the "Brookwood Proposal.") The Brookwood Proposal replaces the original proposal to reallocate WRTR(FM) from Tuscaloosa to Moundville, Alabama, on Channel 290A.

The Commission resolves proposals to change a station's community of license based upon a comparison of the proposed allotment plan and the existing state of allotments for the communities involved.[15] Only if the proposal would result in a preferential arrangement of allotments would the proposal be granted. Further, to determine whether a proposal would result in a preferential arrangement of allotments, the Commission is guided by the FM allotment priorities.[16] Petitioners state that Tuscaloosa has nine radio stations licensed to it, and an allotment to Brookwood would trigger the third allotment priority of first local service.[17]

As Petitioners state in their Amended Proposal, the proposed 70 dBu coverage area of Channel 290C3 at Brookwood will encompass more than 50% of the Tuscaloosa Urbanized Area.[18] In fact, the Brookwood Proposal will encompass 92% of the Tuscaloosa Urbanized Area and 100% of the population.[19] Accordingly, because the proposed allotment will place a city-

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15 Modification of FM and TV Authorizations to Specify a New Community of License, 4 FCC Rcd 4870 (1989), recon. granted in part, 5 FCC Rcd 7094 (1990) (*Change of Community M&O*).

16 *Id.* The FM priorities are: (1) First full-time aural service; (2) Second full-time aural service; (3) First local service; and (4) Other public interest matters. Co-equal weight is given to priorities (2) and (3). *Revision of FM Assignment Policies and Procedures ("FM Priorities")*, 90 FCC 2d 88 (1982).

17 Amended Proposal at p.11.

18 *Id.*

19 Exhibit A (Technical Statement).

grade (70 dBu) signal over 50% or more of the Tuscaloosa Urbanized Area, the Commission must determine whether Brookwood should receive a first local service preference.[20] In making this determination, the Commission is guided by the following three factors: (1) signal population coverage, that is, the degree to which the proposed station will provide service to both the suburban community and the larger metropolis; (2) the size and proximity of the suburban community relative to the metropolis; and (3) the interdependence of the suburban community with the metropolis, as gauged by a number of indicia.[21] All three factors indicate that Brookwood should not be awarded a first local service preference.

A. The Signal Coverage of the Proposed Brookwood Allotment Demonstrates that WRTR(FM) Would Provide Service to Almost All of the Tuscaloosa Urbanized Area.

The proposed Brookwood allotment would enable WRTR(FM) to increase its coverage of the Tuscaloosa Urbanized Area. Specifically, WRTR(FM) would provide a city grade signal to 92% of the Tuscaloosa Urbanized Area and to 100% of the residents in the Tuscaloosa Urbanized Area,[22] whereas it currently provides a city grade signal to 88% of the Tuscaloosa

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[20] Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Headland, Alabama and Chattahoochee, Florida), *Report and Order*, 10 FCC Rcd 10352, ¶ 12 (1995).

[21] *Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama*, 6 FCC Rcd 6580 (1991), *appl. for rev. dismissed,* 12 FCC Rcd 8392 ¶ 20 (1997), *citing Change of Community M&O*, 5 FCC Rcd at n. 14. *See also RKO General (KFRC)*, 5 FCC Rcd 3222 (1990); *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988); *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir. 1951). The Commission applies the *Tuck/KFRC* analysis whenever a proponent specifies a community of license that *either* (1) is located *within* an Urbanized Area, *see, e.g., Tuck*, 3 FCC Rcd at ¶ 48, *or* (2) is located *outside* an urbanized area *but* the proposed facility would place a city grade signal over fifty percent or more of that urbanized area, *see, e.g., Littlefield, Wolfforth and Tahoka, Texas*, 12 FCC Rcd 3215, ¶ 4 (1997) ("Our new policy requires that proponents seeking to relocate to a community *adjacent to an urbanized area* that would place a 70 dBu signal over 50% or more of the urbanized area must submit a *Tuck* analysis") (emphasis supplied).

[22] Exhibit A (Technical Statement).

Urbanized Area and to 100% of the residents in the Tuscaloosa Urbanized Area. These figures indicate that notwithstanding Petitioners' assertion that they intend to provide a first local service to Brookwood, WRTR(FM) would cover more of the Tuscaloosa Urbanized Area as a result of the reallotment.

B. The Size of Brookwood Compared to Tuscaloosa Weighs Against A First Local Service Preference.

A comparison of population figures confirms that the town of Brookwood is indistinguishable from Tuscaloosa. Brookwood's 2000 population of 1,483 persons represents *less than two percent* of the city of Tuscaloosa, which recorded a population of 77,906 persons in the 2000 census.[23] Brookwood, therefore, is not unlike the communities of Richmond, California, and Sandy Springs, Georgia, for which the Commission denied a first local service preference based in part on their close proximity and much smaller sizes relative to their larger neighbor.[24]

C. Brookwood is a Regional Crossroads, Not an Independent Community.

Petitioners have not successfully demonstrated that Brookwood is an independent community for FM channel allotment purposes consistent with the criteria laid down in *Faye and Richard Tuck, Inc.*[25] In *Faye and Richard Tuck*, the Commission set forth an eight-factor analysis of the interdependence of a community with a larger urbanized area. The Commission analyzes: 1) the extent to which the community residents work in the larger metropolitan area, rather than the specified community; (2) whether the smaller community has its own newspaper

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[23] Exhibit D (Alabama Metropolitan Area Population, 2000 and Population Change for April 1, 1990 to April 1, 2000).

[24] *RKO General Inc.*, 5 FCC 3222 at ¶ 20; *Eatonton*, 6 FCC Rcd 6580 at ¶ 24.

[25] *Faye and Richard Tuck, Memorandum Opinion and Order*, 3 FCC Rcd 5374 (1988).

or other media that covers the community's 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 local telephone book provided by the local telephone company 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.[26] Despite Petitioners' representations, a *Tuck* analysis demonstrates that Brookwood is not an independent community for the purposes of FM channel allotments. Brookwood is a regional crossroads with dependencies primarily on the city of Tuscaloosa, but also on Tuscaloosa County and the city of Birmingham.

1. Petitioners have failed to demonstrate that Brookwood residents are not dependent on the surrounding metropolitan area for employment.

Petitioners' inclusion of statistics indicating that 43% of Brookwood residents work in Brookwood does not provide sufficient evidence of Brookwood's independence. As Petitioners note, the majority of Brookwood's residents work in Tuscaloosa or in the Tuscaloosa Metropolitan Statistical Area ("MSA"), which suggests that Brookwood is dependent on the urbanized area for the employment of its residents.

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[26] *Id.* at ¶ 36.

2. Brookwood lacks local media outlets.

Petitioners claim that Brookwood evidences its independence by providing its citizens with local media and an advertising outlet through its publication of the *Brookwood Bulletin* newsletter.[27] The *Brookwood Bulletin*, however, is published on only a quarterly basis and cannot be considered evidence of Brookwood's independence from either the city of Tuscaloosa, or from Tuscaloosa County. Instead, on a day-to-day basis, Brookwood is entirely dependent on regional media outlets for both information and advertising. It receives local television service from Birmingham and Bessemer, daily newspaper service from *The Tuscaloosa News*, *The Birmingham News*, and *The Birmingham Post-Herald*, as well as other regional papers.[28] Among these papers, *The Tuscaloosa News* provides significant coverage of local Brookwood news and events that do not appear to be covered by the *Brookwood Bulletin*.[29] Moreover, Brookwood is amply served by radio stations licensed to Birmingham and Tuscaloosa. Thus, Brookwood's local needs are adequately served by existing regional media services.

The Commission has held that the fact that a community's local needs are served by the media outlets of an adjacent community is strong evidence that the community is not independent for the purposes of allocating a first local service preference.[30] In this case, the

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[27] Amended Proposal at p. 12.

[28] *See* Exhibit D (TV, Newspapers & Radio, Brookwood, Alabama (visited May 8, 2001), <http://www.digital-neighbors.com/city/al/brookwood889d.htm>).

[29] *See, e.g.*, Exhibit D (Moneeck Jackson, *Brookwood Overcomes Bad Luck*, THE TUSCALOOSA NEWS, May 7, 2001); Exhibit D (Jennifer Acosta, *Panel Debates $1M for Brookwood Area Road*, THE TUSCALOOSA NEWS, March 15, 2001); Exhibit D (David Cooper, *Golf and Conference Resort To Be Built in Brookwood*, THE TUSCALOOSA NEWS, Jan. 4, 2001).

[30] *RKO General, Inc.*, 5 FCC Rcd 3222 at ¶ 17 (1990).

absence of any meaningful local media or advertising outlets confirms that Brookwood is dependent on the city of Tuscaloosa and its other surrounding communities.

3. There is no evidence that Brookwood residents consider their community as separate from Tuscaloosa or the surrounding region.

Despite Petitioners' unsupported assertion to the contrary, it does not appear that the people of Brookwood view their community as separate from the city of Tuscaloosa, the surrounding metropolitan area, or the rest of the region. Petitioners cite Brookwood's distance from Tuscaloosa as evidence of its separateness, but ignore the fact that Brookwood is equidistant between Tuscaloosa and Birmingham and receives nearly all of its information from media operating from those communities. In today's mobile society, eighteen miles of separation cannot be considered a surrogate for independence.

Even though Brookwood may provide some of its own municipal services, as described below, it relies on Tuscaloosa City and Tuscaloosa County for many of such services as well. This interrelationship with the rest of the West Alabama region indicates that Brookwood does not have any particular sense of itself as a community independent of Tuscaloosa City and Tuscaloosa County.

4. Brookwood only has a part-time municipal government, which does not demonstrate a community's independence.

Petitioners have cited Brookwood's municipal government as evidence of its independence. In fact, the elected officials are only part-time officials.[31] The Commission has held that a part-time municipal government, in and of itself, does not demonstrate a community's independence for allotment purposes.[32]

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[31] Conversation with Brookwood Town Hall staff.

[32] *Greenfield and Del Ray Oaks, California*, 11 FCC Rcd 12681, ¶ 9 (1996).

5. Brookwood does not have its own local telephone book.

Brookwood does not have its own local telephone book; instead, its listings are included in the Tuscaloosa County phone book.[33] The existence of the 35444 zip code assigned to Brookwood cannot be evidence of the town's independence. From a comparison of the town limits of Brookwood and the geographic coverage of the 35444 zip code, it is clear that the zip code encompasses far more than Brookwood proper, and should be considered as no more than evidence that Brookwood is a city interdependent on the West Alabama region.[34] These factors further demonstrate Brookwood's interdependence with the surrounding community.

6. There is no evidence that businesses located in Brookwood are intended mainly to serve Brookwood; moreover, Brookwood is dependent upon Tuscaloosa for medical care.

Although Petitioners have produced a list of businesses that call Brookwood home, it has failed to make any showing that those businesses are located there solely, or even chiefly, for the purpose of serving Brookwood residents. As the Commission has indicated, the mere location of businesses in a place is not sufficient to make that place an independent community for allotment purposes.[35] Given Brookwood's placement between Birmingham and Tuscaloosa, it seems likely that businesses locate there in order to serve consumers from both urban centers as well as the West Alabama region. This conclusion is reinforced by the existence of the West Alabama Chamber of Commerce and the absence of such an organization for Brookwood businesses. It is also buttressed by the fact that when businesses located in Brookwood advertise their phone

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[33] *See* Exhibit D (Tuscaloosa Telephone Book) (listing Brookwood telephone listings).

[34] *Compare* Exhibit A (Technical Exhibit, Figure 1)(showing Brookwood city limits) *with* Exhibit D (Enviromapper) (showing scope of 35444 area code stretching into adjoining Jefferson County).

[35] *E.g., Gretna, Marianna, Quincy and Tallahassee, Florida*, 6 FCC Rcd 633, ¶ 6 (1991).

numbers, they do so in the Tuscaloosa Yellow Pages, rather than any similar Brookwood phone directory.

Contrary to Petitioners' assertions, Brookwood residents rely primarily on Tuscaloosa for medical services. The Brookwood Medical Clinic cited by Petitioners[36] has been closed since June 28, 2000, and there are no plans to re-open it.[37] Although Brookwood has a fire department, Brookwood pays Tuscaloosa County to provide 9-1-1 and ambulance services, and in emergency situations, Brookwood residents are taken to the DCH Regional Medical Center eighteen miles away in Tuscaloosa. Given the closure of the clinic, Brookwood residents would also need to travel to Tuscaloosa for non-emergency medical services.

7. Brookwood and Tuscaloosa share the same advertising market.

Tuscaloosa's daily newspaper, *The Tuscaloosa News*, considers Brookwood within its market, and has a daily circulation of 201 subscribers (including businesses and individuals) in Brookwood.[38] Thus, Brookwood's dependence on regional media outlets for information and advertising, and the fact that *The Tuscaloosa News* considers the community to be part of its market provides persuasive evidence that Brookwood and Tuscaloosa share the same advertising market.

8. Brookwood relies heavily on Tuscaloosa and the surrounding county for municipal services such as emergency services and waste management.

Petitioners cite Brookwood's provision of its own public safety and municipal services as evidence of its self-perceived separateness. In fact, evidence shows that Brookwood residents

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36 Amended Proposal at p.13.

37 Conversation with Brookwood Town Hall staff.

38 Conversation with Circulation Department staff at *The Tuscaloosa News*.

take advantage of a panoply of regional services including those of the County Sheriff's Department, county waste management, and county schools. Petitioners' contention that the presence of the regional county elementary and high schools in Brookwood is relevant to its independence from the surrounding community is belied by the fact that based on the attendance figures for the schools, as compared to the overall population figures for Brookwood, it is clear that the majority of students who attend those schools do not live in the town.[39] The Commission has held that the mere presence of regional schools within the boundaries of a community is not sufficient to indicate its status as an independent community for allotment purposes.[40]

A recent story in *The Tuscaloosa News* shows that even mundane Brookwood events like car accidents draw the participation of Tuscaloosa fire and police personnel.[41] Brookwood business people do not participate in a Brookwood chamber of commerce, but instead participate in the regional West Alabama Chamber of Commerce. Far from showing Brookwood's sense of itself as an independent community, such events and the facts they illustrate show that Brookwood considers itself to be a functioning part of a thriving regional community that includes both the city and county of Tuscaloosa.

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[39] *Compare* Exhibit D (Brookwood Elementary School website, (last visited May 6, 2001) <http://www.dbtech.net/schools/brookwood/elementary.index.html>) (citing estimated K-6 enrollment of approximately 990); Exhibit D (Brookwood High School website (last visited May 6, 2001) <http://www.dbtech.net/schools/brookwood/high/bhs.html>) (citing 7-12 enrollment of approximately 1000) *and* Amended Proposal at p. 13 *with* Exhibit D (2000 U.S. census figure citing overall population of 1,483).

[40] *E.g. Vimville, Mississippi*, 55 R.R.2d 256, ¶ 11 (1983).

[41] *See* Exhibit D (Emilio Sahurie, *Brookwood Woman Killed By a Tree*, THE TUSCALOOSA NEWS, May 7, 2001).

In sum, Petitioners' Brookwood Proposal utterly fails to satisfy the *Tuck* requirements for demonstrating an independent community for allotment purposes. The reality is that Brookwood has no local newspapers, no local television affiliates, no local radio stations, no public transportation, no libraries, no hospitals or significant healthcare facilities, only a skeletal police department and a volunteer fire department, and only a part-time town government that provides only the most rudimentary services. Despite lacking these indicia of independence, Brookwood is adequately, indeed handsomely, served by media outlets and public services that are furnished by the city of Tuscaloosa, Tuscaloosa County, and the city of Birmingham. Essentially, Brookwood is what its location suggests: a regional crossroads with ties to the urban centers that it rests between, with a particular dependence for health care, electronic and newspaper media, and advertising outlets, on the City of Tuscaloosa. Such communities are not meant to give allotment proposals the advantage of a first local service preference,[42] and Petitioners should not gain such a preference for their Brookwood Proposal.

D. The Brookwood Proposal Would Be Contrary To the Public Interest.

In light of the interdependence of Brookwood with the surrounding urbanized area, the Brookwood Proposal does not merit a first local service preference. Accordingly, the Commission must compare the proposed allotment plan and the existing state of allotments under the fourth priority, public interest matters. The Commission has stated that the prevention of the possible disruption of service resulting from a channel substitution is a public interest

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[42] *RKO General*, 5 FCC 3222 at ¶ 17.

consideration that weighs in favor of the opposing proposal.[43] Accordingly, the disruption to the public from the Brookwood Proposal weighs in favor of retaining WRTR(FM) at Tuscaloosa. Moreover, WRTR(FM)'s existing 60 dBu contour already covers Brookwood; therefore WRTR(FM) may provide service to Brookwood from its current facilities in Tuscaloosa without causing any interruption of service to its current listeners. Accordingly, the Commission should not grant the Brookwood Proposal.

III. THE TROY AND WINFIELD PROPOSALS MUST BE DENIED BECAUSE THEY CREATE UNACCEPTABLE LOSSES OF SERVICE.

Petitioners propose that WKXM-FM, Winfield, Alabama, be modified by substituting Channel 249A for Channel 290A at Winfield, Alabama (the "Winfield Proposal") and that WZHT at Troy, Alabama, be downgraded from Channel 289C to Channel 289C0 at new transmitter reference coordinates (the "Troy Proposal"). Both the Winfield and Troy Proposals result in unacceptable losses of service that are contrary to the public interest. The Winfield Proposal will cause 1,138 persons over an area of 439 square kilometers to lose service.[44] The Troy Proposal will cause 174,500 persons over an area of 9,155 square kilometers to lose service,[45] assuming minimum Class C0 facilities, or will cause 57,400 persons over an area of

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43 *See* Amendment of Section 73.202(b),Table of Allotments, FM Broadcast Stations (Mount Horeb, Mazomanie and Dodgeville, Wisconsin), *Report and Order*, 12 FCC Rcd 11963, ¶ 5 (1997).

44 Amended Proposal at p. 14, Exhibit E, Figure 10.

45 *Id.* at p. 15.

4,700 square kilometers to lose service, assuming maximum Class C0 facilities.[46] Petitioners provide no justification for these losses despite the fact that in both cases, the population losses will exceed any gains.[47] Indeed, assuming minimum Class C0 facilities for WZHT, there will be *no gain* in service.[48] Such an extensive loss of service resulting from these proposals presumptively is contrary to the public interest. The listeners in Winfield and Troy have grown to rely on these stations to provide programming that addresses their community problems, needs and interests. As the Commission has stated, "The public has a legitimate expectation that existing service will continue.[49] Accordingly, the Commission should deny the Winfield and Troy Proposals.

IV. THE COMMISSION SHOULD GRANT THE COUNTERPROPOSAL FOR DERMA, MISSISSIPPI.

Cox supports the Counterproposal filed by Southern Broadcasting, LLC ("Southern Broadcasting Counterproposal" to allot Channel 279A to Derma, Mississippi, as its first local service, which is mutually exclusive with Clear Channel's proposal to reallocate Channel 280C2

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[46] In calculating service losses and gains, the Commission normally assumes maximum facilities for the particular class of station. Amendment of Section 73.202(b) Table of Allotments, FM Broadcast Stations (Greenup, Kentucky and Athens, Ohio), *Memorandum Opinion and Order*, 6 FCC Rcd 1493, ¶ 4 n.7 (1991). With respect to Class C stations, the FCC generally, however, assumes minimum facilities. *Id.* The Commission has not yet stated whether minimum or maximum Class C0 facilities should be assumed to calculate losses and gains in service. However, given that Class C0 stations represent a subset of the former Class C designation, *see* 1998 Biennial Regulatory Review – Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules, *Second Report and Order*, 2000 FCC Lexis 5823, ¶¶ 15, 21 (Nov. 1, 2000), it is only logical that minimum facilities also would be assumed for Class C0 allotments.

[47] The Winfield Proposal will result in a loss of service to 7,237 persons and a gain to only 6,099 persons. The Troy Proposal will result in a loss of service to 57,061 persons and a gain to only 7,515 persons. Amended Proposal, Engineering Statement, Exhibit E, Figure 15.

[48] Exhibit A (Technical Statement).

[49] *Change of Community M&O*, 5 FCC Rcd 7094 at ¶ 19.

from Columbus to Okolona, Mississippi, and modify the license of WACR(FM) accordingly. Southern Broadcasting also proposes the allotment of Channel 288A to Springville, Alabama, as its first local service, which is mutually exclusive with the Pleasant Grove Proposal and is now mutually exclusive with the Hoover Proposal. In light of the new services provided by the Southern Broadcasting Counterproposal, Cox respectfully urges the Commission to grant the proposed new allotments to Derma and Springville.

CONCLUSION

In light of the foregoing, the Commission should deny the Hoover Proposal and grant the mutually exclusive Springville proposal. As discussed, the Commission's policies require the denial of the Hoover Proposal due to its violation of the minimum distance rules and its contingency upon the future construction and licensing of WYAI(FM) in order to comply with the minimum distance rules. Grant of the Springville Proposal will provide the community of Springville with its first local service and serve the public interest more effectively than the Hoover Proposal.

Moreover, the Commission should deny the proposed reallocation of WRTR(FM) to Brookwood, Alabama on Channel 290C3. As demonstrated, Brookwood is interdependent upon the Tuscaloosa Urbanized Area and does not merit a first local service preference. The interruption of service resulting from the Brookwood Proposal weighs in favor of retaining WRTR(FM) at its current location. The Commission also should deny the proposed reallotment of WKXM-FM, Winfield, Alabama, from Channel 290A to Channel 249A and the proposed downgrade of WZHT(FM), Troy, Alabama, from Channel 289C to 289C0 due to the unacceptable losses of service that would result from the proposals. Finally, the Commission