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BEFORE THE

Federal Communications Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
 Amendment of Section 73.202(b))
 Table of Allotments)
 FM Broadcast Stations)
 (Detroit Lakes and Barnesville, Minnesota))

MM Docket No. 00-53
 RM-9823
 RM-9950

To: Chief, Allocations Branch
 Policy and Rules Division
 Mass Media Bureau

PETITION FOR RECONSIDERATION

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SUMMARY

Everyone knows what is happening in this case -- yet the initial decision of the Allocations Branch ignores reality and the objectives of Section 307(b) by allowing a shift in service from Detroit Lakes to Barnesville, Minnesota, a substantially smaller community that is little more than an appendage of the Fargo-Moorhead Urbanized Area. The Fargo-Moorhead market is already served by at least thirteen stations. Indeed, the proposed transmitter site for KRVI(FM) is one used by two other Fargo-Moorhead stations, and fully serves the entire Urbanized Area. Given that the population of the Fargo-Moorhead metro is fifty times that of Barnesville, any realistic assessment compels the conclusion that this proposal is simply a proposal to serve the much larger Urbanized Area, and not to provide an independent voice to the small community of Barnesville.

The Allocations Branch erred in its specific findings which led it to the conclusion that Barnesville is sufficiently independent of the Fargo-Moorhead Urbanized Area to warrant a first local service preference. In its decision, the Allocations Branch ignored the fact that the first two criteria articulated in *Faye and Richard Tuck, Inc.*, 3 FCC Rcd 5374 (1988) ("*Tuck*") -- signal population coverage and the relative population sizes of the specified community and the Urbanized Area -- require the conclusion that Barnesville is but a part of the Urbanized Area. With regard to the third criterion concerning the independence-interdependence of the community, the Allocations Branch failed to review all the facts in the record.

Moreover, in granting T&J's request, the Allocations Branch incorrectly determined that Barnesville was more worthy of an allotment than was Enderlin, North Dakota, despite the many public interest factors that demonstrate otherwise. In doing so, it totally ignored the proposal

advanced by the Enderlin applicant that the Barnesville channel, if allotted, be allotted with a site restriction allowing both communities to receive a first service. This was clear error.

In addition, the decision of the Allocations Branch is even more troubling in light of circumstances that were not present when T&J filed its initial reallocation petition. Since the date of that filing, Clear Channel Broadcasting Licenses, the new KRVI licensee, has acquired the construction permit for KCHY(FM), Hope, North Dakota. Relocation of KRVI(FM) to the proposed transmitter site will result in a substantial city-grade overlap of KRVI(FM) with KCHY(FM), and cause the licensee to be in violation of Section 73.3555(a)(1)(ii) of the Commission's rules. Since it cannot operate KRVI from the proposed reference coordinates, the underlying expression of interest in the Barnesville reallocation can no longer be credited. Thus, this rulemaking must fail. If the Commission were to allow Clear Channel to amend the reference coordinates at this late date - then the Commission should demand reference coordinates which will allow for the Enderlin allotment. Thus, these new facts compel a different decision in this proceeding. Based on these matters, it is respectfully requested that the initial decision of the Allocations Branch be reversed.

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To: Chief, Allocations Branch
Policy and Rules Division
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PETITION FOR RECONSIDERATION

Triad Broadcasting Company, LLC, the parent of Monterey Licenses, LLC, licensee of stations KQWB(FM), Moorhead, Minnesota, KVOX(FM), Moorhead, Minnesota, KLTA(FM), Breckenridge, Minnesota, KPFX(FM), Fargo, North Dakota, KQJD(AM), West Fargo, North Dakota, and KQWB(AM), West Fargo, North Dakota, by its attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby petitions for reconsideration of the Report and Order, DA 01-2987, released December 21, 2001, by the Chief, Allocations Branch, in the above-captioned proceeding initiated by T&J Broadcasting, Inc. ("T&J").¹ Triad submits that the decision of the Allocations Branch to amend the Table of Allotments to permit KRVI(FM) to

¹ At the request of T&J, former licensee of Station KRVI(FM), Channel 236C1, Detroit Lakes, Minnesota, the Mass Media Bureau issued a Notice of Proposed Rulemaking in this proceeding proposing the (a) reallocation of Channel 236C1 from Detroit Lakes, Minnesota to Barnesville, and (b) the modification of the Station KRVI(FM) license to specify Barnesville as the community of license. Triad filed Comments on May 1, 2000, and Reply Comments on May 30, 2000, in opposition to the proposed reallocation arguing that Barnesville is not entitled to consideration as a first local service. Enderlin Broadcasting Company filed a counterproposal seeking a first local service allotment at Enderlin, North Dakota. On November 2, 2000, T&J assigned the license for KRVI(FM) to Clear Channel Broadcasting Licenses, Inc. ("Clear Channel"). See FCC File No.

Footnote continued on next page

move from Detroit Lakes to Barnesville ignores the reality of the situation – this is clearly a move by an existing Fargo metropolitan area broadcaster to make a station licensed to an independent community into just another metro station. The decision to approve this proposal at the expense of a proposal to allot a first service to Enderlin, North Dakota -- a truly independent community -- is not supported by substantial evidence, contains prejudicial errors of fact and substantive law and is inconsistent with Commission precedent. Accordingly, Triad respectfully requests reconsideration of the Report and Order and denial of the request to move KRVI(FM) to Barnesville.

Introduction

In this case, the proposed reallocation would contravene the objectives of Section 307(b) because it would result in shifting service from Detroit Lakes to Barnesville, Minnesota, a substantially smaller community that is little more than an appendage of the Fargo-Moorhead Urbanized Area which is already served by at least thirteen stations.² Indeed, the proposed transmitter site for KRVI(FM) is located less than one mile outside of the Fargo-Moorhead Urbanized Area, and is also used by Clear Channel station KVOX(AM), and by Triad's KVOX(FM), which both serve the Fargo-Moorhead market.³ Given the discrepancy in the population of Barnesville and the Fargo-Moorhead Urbanized Area, any realistic assessment compels the conclusion that this is simply a proposal to serve the much larger Fargo-Moorhead Urbanized Area, and not to provide an independent voice to the small community of Barnesville.

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BALH-20000705ACT. Thus, T&J no longer has any interest in the station or in this proceeding.

² See Triad's Comments at 31.

³ See Triad's Comments, Appendix A, Engineering Statement of Roy Stype, III at Fig. 1.

As shown below, the Allocations Branch erred in finding that Barnesville is sufficiently independent of the Fargo-Moorhead Urbanized Area to warrant a first local service preference. In its decision, the Allocations Branch ignored the fact that the first two criteria articulated in *Faye and Richard Tuck, Inc.*, 3 FCC Rcd 5374 (1988) (“*Tuck*”) – signal population coverage and the relative population sizes of the specified community and the Urbanized Area – compel the attribution of the aural services in the Fargo-Moorhead Urbanized Area to Barnesville in the 307(b) analysis. With regard to the third criterion concerning the independence-interdependence of the community, the Allocations Branch failed to review all the facts in the record and summarily reached the inaccurate conclusion that Barnesville is independent of the Fargo-Moorhead Urbanized Area.

Moreover, in granting T&J’s request, the Allocations Branch incorrectly determined that Barnesville was more worthy of an allotment than was Enderlin, North Dakota, despite the many public interest factors that demonstrate otherwise. In doing so, it totally ignored the proposal advanced by the Enderlin applicant that the Barnesville channel, if allotted, be allotted with a site restriction allowing both communities to receive a first service. This was clear error.

In addition, the decision of the Allocations Branch is even more troubling in light of circumstances that were not present when T&J filed its initial reallocation petition. Since the date of that filing, Clear Channel has acquired the construction permit for KCHY(FM), Hope, North Dakota.⁴ Relocation of KRVI(FM) to the proposed transmitter site will result in a substantial city-grade overlap of KRVI(FM) with KCHY(FM).⁵ Given this development, the

⁴ See FCC File No. BAPH-20001101ABD. This transaction was consummated on January 22, 2002.

⁵ See Triad Broadcasting Comments, Appendix A, Engineering Statement of Roy Stype, III at 3. As shown in the Engineering Statement at page 3 and Figure 1.0, the reference coordinates specified in this rulemaking are such that the city grade contours of these stations will overlap. Unless Clear Channel renounces its intent to construct the facilities

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reallotment of KCHY(FM) to Barnesville at the proposed reference coordinates will result in Clear Channel owning seven stations in the Fargo-Moorhead market, including five FM stations, in violation of Section 73.3555(a)(1)(ii) of the Commission's rules.⁶ Apparently recognizing this fact, Clear Channel has committed, in connection with pleadings relating to the KCHY(FM) acquisition, to requesting site coordinates for KRVI(FM) at a location difference than those currently being proposed. However, Clear Channel has not notified the Commission in this proceeding that the reference coordinates that it seeks are no longer viable. Since it cannot operate KRVI from the proposed reference coordinates, the underlying expression of interest in the Barnesville reallocation and the relocation at the proposed reference coordinates can no longer be credited – thus its rulemaking must fail. Even if the Commission were to allow Clear Channel to amend the reference coordinates at this late date, the Commission must demand the use of reference coordinates which will permit the Enderlin allotment. These new facts compel a different decision in this proceeding.

Discussion

I. The Allocations Branch Ignored the Real Impetus Behind the Reallocation Proposal – Namely That T&J's True Intention is to Serve the Large Fargo-Moorhead Urbanized Area and Not the Small Barnesville Community.

In adopting its rules permitting FM stations to change their communities of license, the Commission stated that it would not permit manipulation of its allotment criteria by granting a Section 307(b) first local service preference in situations where, as here, such a preference is sought for an urban community that is interdependent, and part of a larger metropolitan area.

Modification of FM and TV Authorizations, 5 FCC Rcd 7094, 7096 (1990). Yet that is precisely

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specified in the instant rulemaking, both that proposal and the KCHY acquisition cannot be accomplished without violating the FCC's multiple ownership rules.

what the Allocations Branch has done in this case. Specifically, the Allocations Branch ignored reality in finding that T&J Broadcasting's decision to change its city of license to Barnesville was being done to serve that smaller community. While the result might serve the private economic interests of Clear Channel, the current owner of KRVI(FM), it cannot be squared with Commission precedent or a common sense approach to the public interest.

The Commission has stated that its policy is to review allotment requests in a flexible manner based on the particular circumstances of a given case, consistent with Section 307(b) of the Communications Act. As the Commission put it:

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 Section 307(b) related policies.

5 FCC Rcd at 7096 (emphasis added). In short, a Commission decision assessing the value of a first local service should not do what the Allocations Branch has done here, namely, base a decision on a wooden recitation of the facts which appear to justify a preference. Rather, a Commission decision should be based on a realistic assessment of the service that will be rendered if a preference were granted. Here, the realistic comparison is not between independent communities of Enderlin and Detroit Lakes versus Barnesville, but instead between Enderlin and Detroit Lakes as compared against another service to the already well-served Fargo-Moorhead metropolitan area. Nevertheless, the Allocations Branch has chosen to blindly apply the first local preference of its allotment criteria to the detriment of the communities of Detroit Lakes and Enderlin, and the public interest in general.

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⁶ See 47 C.F.R § 73.3555(a)(1)(ii).

Under the proposed allotment, KRVI(FM) was granted authority to completely abandon the Detroit Lakes service area which has approximately 6,600 people to ostensibly provide service to Barnesville, a community of approximately 2,000 people.⁷ It stretches credulity to argue that a broadcaster would willingly move to a community more than three times smaller than its current community of license for any reason other than for maximizing economic profit. It is Clear Channel's obvious hope and intention to use this reallocation to move closer to the Fargo-Moorhead market and increase its advertising revenue from the Fargo-Moorhead Urbanized Area, at the expense of the less lucrative community of Detroit Lakes.

Moreover, if Clear Channel's true intent is to serve the residents of Barnesville, there would be no reason to move the station's transmitter site because KRVI(FM) can serve Barnesville from Detroit Lakes. But, as its city of license is Detroit Lakes, Clear Channel is limited in how far it can move its tower site towards the Fargo-Moorhead metropolitan area by the requirement that it place a city grade signal over Detroit Lakes. Thus, the only explanation for T&J's desire to move KRVI(FM) to Barnesville is that it would enable the station to provide a city-grade signal to the entire Fargo-Moorhead Urbanized Area, and locate on a tower used by other Fargo-Moorhead stations.⁸ Based on these facts, there can no doubt that the move to Barnesville is nothing but a change requested so as to allow KRVI(FM) to better serve the Fargo-Moorhead market.

II. The Allocations Branch Erred In Finding That Barnesville is Independent of the Fargo-Moorhead Urbanized Area

The proposed reallocation of KRVI(FM) to Barnesville does not comply with Commission policies concerning the allotment of FM Channels to communities, or with Section

⁷ See Triad's Comments at 16, 30.

⁸ See Triad's Comments, Appendix A, Engineering Statement of Roy Stype, III at 3.

307(b) of the Communications Act of 1934, as amended. According to the Allocations Branch, the factors to be considered in its analysis of whether Barnesville is sufficiently independent of the Fargo-Moorhead Urbanized Area can be articulated as follows: (1) the extent to which KRVI(FM) will provide service to the Fargo-Moorhead Urbanized Area; (2) the relative population sizes of Barnesville and Fargo-Moorhead; (3) and, most importantly, the independence of Barnesville from the Fargo-Moorhead Urbanized Area.⁹ In considering these factors, the Allocations Branch concluded that it should award a first service preference to Barnesville. Nevertheless, as shown below, the conclusion of the Allocations Branch erroneously relied on incomplete facts and misapplied the Commission's policy with respect to community of license changes.

A. At the proposed transmitter site, KRVI(FM)'s signal will cover all of the Fargo-Moorhead Urbanized Area.

In terms of signal coverage, the 70dBu contour of KRVI(FM) will cover the entire Fargo-Moorhead Urbanized Area. Yet the Allocations Branch offers no explanation of why it did not apply a presumption that the Fargo-Moorhead Urbanized Area is the relevant "community" to evaluate under the independent-interdependent criterion. Moreover, the Report and Order dismisses the fact that the transmitter for KRVI(FM) will be located less than a mile from the Fargo-Moorhead Urbanized Area, providing total coverage to the market, and located on a tower used by at least two other stations which serve the market. Given KRVI(FM)'s proposed transmitter location and coverage of the entire Urbanized Area, Triad is frankly mystified that the Allocations Branch could make any finding that Barnesville is independent of the Fargo-Moorhead Urbanized Area.

⁹ Report and Order at ¶ 4 citing *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir 1951) ("*Huntington*"); *RKO General, Inc. (KFRC)*, 5 FCC Rcd 3222 (1990); *Tuck*.

B. The population of the Fargo-Moorhead Urbanized Area is 50 times larger than Barnesville.

Under the second criterion, the Commission has found that less evidence is required to demonstrate that communities are interdependent when the suburban community at issue is significantly smaller than the central city.¹⁰ With respect to relative sizes, the 1990 Census lists Barnesville's population as 2,066, and Fargo and Moorhead's are 74,111 and 32,295 respectively. These figures show that the Fargo-Moorhead Urbanized Area has a population more than 50 times larger than that of Barnesville. The great differential in size between Barnesville and Fargo-Moorhead and the proximity of the communities are compelling indications of interdependence.¹¹ Nevertheless, the Allocations Branch failed to acknowledge that, under *Tuck*, a *lesser* showing of interdependence is required due to the relative size of the communities. The failure of the Allocations Branch to recognize that only a lesser interdependence showing was required constitutes prejudicial error because, as the Allocations Branch noted, interdependence is the most important criterion under *Tuck*.

C. An accurate analysis of the Tuck factors demonstrates that Barnesville is not independent of the Fargo-Moorhead Urbanized Area.

In evaluating the eight factors set forth in *Tuck*, the Allocations Branch merely lumped together selected bits of evidence regarding the factors and then abruptly concluded that a "majority of the *Tuck* factors support a finding of independence from the Fargo-Moorhead Urbanized Area." Report and Order at ¶ 5. But, as demonstrated below, the Allocations Branch ignored a great deal of contrary evidence cited by Triad in its comments and committed numerous errors in assessing the proposed reallocation under the *Tuck* factors.

¹⁰ *Tuck*, 5 FCC Rcd at 5378.

¹¹ *RKO*, 5 FCC Rcd at 3223; *Eatonton and Sandy Springs, Georgia*, 6 FCC Rcd 6580 at ¶¶ 24, 25 (1991) (Commission denied a first local service preference based in part on much smaller size of community relative to the larger central city of an urbanized area).

1. The extent to which community residents work in the larger metropolitan area, rather than the specified community.

The Allocations Branch accepted T&J's claim that there are "an abundance of businesses that exist in Barnesville." However, this finding, devoid of any factual support is not relevant to the inquiry under the first factor. The question is not whether there are business establishments in Barnesville, but rather, the extent to which the residents of Barnesville work in the larger metropolitan area, as opposed to the specified community.¹² As an initial matter, T&J failed to satisfy the Commission's general requirement to demonstrate that the majority of the Barnesville residents work in the local community. Instead, it merely provided a list of commercial establishments.¹³ In fact, the Allocations Branch inexplicably placed the burden of proof on Triad, citing its failure to state "the number of persons comprising the Barnesville workforce or the number of Barnesville residents working in Fargo or Moorhead." Report and Order at ¶ 6. Not only does the position of the Allocations Branch wrongly accuse Triad, but the statement is simply wrong. Triad supplied a study prepared by Moorhead State University demonstrating that "approximately 65% of the working class in Barnesville commute to the Fargo-Moorhead area" for work. Triad Comments at 18. Therefore, uncontroverted evidence demonstrates that the vast majority of Barnesville residents work within the Fargo-Moorhead Urbanized Area – a fact that the Allocations Branch failed to consider.

¹² See *RKO*, *supra* n. 11.

¹³ See *Pleasanton, Bandera, Hondo, and Schertz, Texas*, 15 FCC Rcd 3068, 3071 (2000) at ¶ 9 (providing a list of businesses is insufficient to establish that a majority of residents live and work in the community under a *Tuck* analysis) (*dismissed on other ground*, 12 FCC Rcd 8392 (1997)).

2. Whether the smaller community has its own newspaper or other media that covers the community's local needs and interests.

Although Barnesville has its own weekly newspaper, the Allocations Bureau failed to afford sufficient weight to Triad's showing that 87.7% of the newspapers distributed in Barnesville are published in Fargo. As a result, the Allocations Branch erred in failing to find that this factor supports a finding of interdependence.

3. Whether the community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area.

The Allocations Branch completely glossed over the fact that not a single statement from a community leader or resident of Barnesville was submitted to show that they perceive Barnesville to be separate from the nearby Fargo-Moorhead Urbanized Area.¹⁴ And, while the Report and Order cites references to local community events and social organizations located in Barnesville, the Allocations Branch incorrectly refused to recognize that providing a list of a few of these organizations does not address the question of whether Barnesville's community leaders and residents perceive the community to be separate from the larger metropolitan area.¹⁵ As Triad pointed out in its comments, "although the residents of Arlington, Virginia may attend an annual parade or other charitable event in different areas of the Arlington community ... such participation falls far short of establishing that Arlington residents *perceive* themselves to be separate from, and independent of, the Washington, D.C. Urbanized Area." Triad Comments at 19. The Allocations Branch erred in finding that a few community events, absent statements

¹⁴ See, *Akeny and West Des Moines, Iowa*, 15 FCC Rcd 4413 (2000) at ¶¶3-5 (declarations by community leaders are an important fact leading to a finding that a community is independent).

¹⁵ *Tuck*, 3 FCC Rcd at 5378; see also *Anniston and Ashland, Alabama, and College Park, Covington, Milledgeville and Social Circle, Georgia*, 16 FCC Rcd 3411 at ¶8.

from community leaders and residents, support a finding of Barnesville's independence from Fargo-Moorhead.

4. Whether the specified community has its own local government and elected officials and whether the smaller community has its own telephone book or zip code.

With regard to factors four and five, the Allocations Branch noted that Barnesville has its own local government and elected officials, and that it has its own local telephone directory and zip code. Report and Order at ¶ 7. According to the Allocations Branch, this “clearly supports a determination concerning the independence of Barnesville.” *Id.* However, contrary to the bold statement of the Allocations Bureau, these facts should be afforded little weight as the existence of a local government and the existence of a local post office and zip code are of little significance because the same would be true of most incorporated communities that are interdependent with an urbanized area.¹⁶ In fact, as Triad amply demonstrated in its comments, both *Huntington* and *RKC* make it clear that factors four and five should be given little weight in determining whether a smaller community is dependent on the larger Urbanized Area.¹⁷ Therefore, these factors should have been given little, if any, weight in determining whether Barnesville is independent of the Fargo-Moorhead Urbanized Area.

5. Whether the community has its own commercial establishments, health facilities, and transportation systems.

The Allocations Branch found that Barnesville has a variety of local businesses. Report and Order at ¶ 8. It is true that Barnesville, like every suburban community, has some local stores. However, as Triad demonstrated in its comments, Barnesville has surprisingly few

¹⁶ Using the logic of the Allocations Branch, the Bronx, New York would be independent of the New York metropolitan area as it has its own Borough President independent of the Mayor of the City of New York as well as its own post offices and several zip codes.

¹⁷ *Huntington*, 192 F.2d at 33; *RKO*, 5 FCC Rcd at 3222.

business establishments. The Allocations Branch failed to discuss Triad's showing that Barnesville lacked the majority of businesses one would normally associate with an independent community, including movie theaters, department stores, drugstores, toy stores, car dealers, a taxi service or a hospital, to name a few.¹⁸ As Triad's comments make clear, residents of Barnesville are dependent upon Fargo-Moorhead to meet many of their most basic needs. Therefore, the finding of the Allocations Branch that the evidence demonstrates Barnesville's independence from the Fargo-Moorhead Urbanized Area cannot be sustained.

6. The extent to which the specified community and the central city are part of the same advertising market.

The Allocations Branch grudgingly admits that the evidence "suggests" that Barnesville and Fargo-Moorhead are in the same advertising market. Report and Order at ¶ 8. As shown by Triad in its Comments, Clay County, in which Barnesville is located, is within both the Fargo-Arbitron Metro Area and the Fargo-Moorhead DMA. Moreover, station KRVI(FM) is already rated in the Fargo-Moorhead radio market with as much as 95% of the advertising aired on its station being purchased from the Fargo-Moorhead area.¹⁹ As the Allocations Branch itself noted, these facts demonstrate that Barnesville and Fargo-Moorhead are within the same advertising market.

¹⁸ Triad's Comments at 21-24. Indeed, the Commission has noted that the presence of such commercial services weighs toward independence – which is simply not the case here. *See Bon Air, Chester, Mechanicsville, Ruckersville, Williamsburg and Fort Lee, Virginia*, 11 FCC Rcd 5758 (1996) at ¶11.

¹⁹ *See* Triad Comments at 25. *See also* Declaration of Nancy Odney, Attached as Appendix J to Triad's Comments. Tellingly, these figures shown that KRVI(FM) is already operating as a Fargo-Moorhead station from its Detroit Lakes community of license. The proposed move to a transmitter site located within the Fargo-Moorhead Urbanized Area will only increase KRVI(FM)'s reliance on Fargo-Moorhead advertisers and listeners.

7. 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.

Although the Allocations Branch noted that Barnesville has various municipal services, the Report and Order afforded too much weight to this factor in light of the D.C. Circuit's holding in *Huntington* and the Commission's holding in *RKO*.²⁰ In *Huntington*, the Court found that the 30,000 person community of Huntington Park had its own municipal organizations yet denied to grant it a first local service preference.²¹ Similarly, in *RKO* the Commission denied a reallocation request despite finding that the community had "scores of civic organizations."²² Because Barnesville's municipal services are not nearly as extensive as those found in *Huntington* and *RKO*, the Allocations Branch afforded too much weight to factor eight in its analysis.

As demonstrated above, only three of the eight *Tuck* factors could conceivably demonstrate that Barnesville is independent from the Fargo-Moorhead Urbanized Area and those are factors which should be given little, if any, weight. Simply because Barnesville has its own local government, a local phone book, zip code and a few municipal services is insufficient to establish that it is independent of the Fargo-Moorhead Urbanized Area. This is particularly true when the other five factors overwhelmingly establish that Barnesville is interdependent with the

²⁰ The Allocations Branch ignores the controlling authority of *RKO* here by attempting to distinguish this case on a mere factual difference, rather than any doctrinal one. The Branch suggests *RKO* only applies in a proposed move of an allotment from an urban center to a suburb. Report and Order at ¶9. Under this tortured interpretation, *RKO* would not serve as precedent when, as here, a party proposes to move an allotment from rural location to a suburb. Such an interpretation ignores more than 140 existing decisions in which *RKO* is controlling authority.

²¹ 192 F.2d at 34.

²² 4 FCC Rcd at 4999 ¶ 11.

Fargo-Moorhead Urbanized Area. Therefore, because Triad has satisfied all three criteria articulated in *Tuck* and *RKO* for applying the exception set forth in *Huntington*, the Bureau erred in awarding Barnesville a first local service preference over the request for the new allotment at Enderlin.

III. The Allocation Branch Erred in Finding that T&J's Proposal Would Result in a Preferential Arrangement of Allotments

As shown above, the Allocations Branch erred in awarding Barnesville a first local service preference and a third allotment priority. Under the fourth allotment priority, retaining station KRVI(FM) in Detroit Lakes would be preferable to reallocating Channel 236C1 to Barnesville. In short, Detroit Lakes is more deserving of a full time FM service than is Barnesville. The reallocation is really a choice between Detroit Lakes losing one of only three full-time services and the Fargo-Moorhead Urbanized Area gaining another service – even though it is already well-served by at least 13 stations. As the Commission stated in *Fairfield and Norwood Ohio*, 7 FCC Rcd 2377 (MMB 1992), the public has a legitimate expectation that existing service will continue, and this expectation is a factor that must be weighed independently against the service benefits that may result from reallocating a channel from one community to another, regardless of whether the service removed constitutes a transmission service, reception service, or both.

Detroit Lakes has a population of 6,635 persons that are served by only one other local FM station and a 1 kW AM station.²³ In contrast, as noted above, the Fargo-Moorhead Urbanized area is served by numerous stations, all of which should be attributed to Barnesville.²⁴ Moreover, the proposed allotment would result in a net loss of service to 33,984 persons within

²³ See Triad's Comments at 30–31.

²⁴ See, e.g., *Greenfield and Del Ray Oaks, California*, 11 FCC Rcd 12681 (Allocation Branch 1996).

KRVI's 1mV/m contour and a loss of service to 1,961 persons within a 371.6 square kilometer underserved area.²⁵ At its new site, KRVI(FM) would provide no cognizable reception service benefits as it is the type of "urban move-in" that the Commission has consistently discouraged. Thus, the net loss of service and significant loss of service disprove the conclusion of the Allocations Branch that the reallocation of Channel 236C1 to Barnesville would result in a preferential arrangement of allotments.

In addition, allocating KRVI(FM) to Barnesville would preclude the residents of Enderlin from receiving their first local transmission service and a new primary reception service. The Report and Order ignores the fact that a denial of Barnesville's reallocation request would have resulted in a new reception service to 182,766 persons, would provide a new reception service to 12,386 people in underserved areas while eliminating an existing gray area, and would avoid a net loss of service to 32,835 people.²⁶ The gray area alone compels a 307(b) finding in favor of the Enderlin proposal.²⁷ Contrary to Commission precedent and without adequate explanation, the Allocations Branch dismissed the Counterproposal of Enderlin Broadcasting based exclusively on the fact that Barnesville has slightly more residents than does Enderlin. Because the significant public interest benefits that would result from the proposal to allot Channel 233C1 to Enderlin greatly outweigh the comparatively insignificant difference in population that exists between Enderlin and Barnesville, the Allocations Branch erred in granting T&J's reallocation request.

²⁵ See Triad's Comments at 31.

²⁶ See Triad's Reply Comments at 10.

²⁷ See *Mighty-Mac Broadcasting Co.*, 101 FCC 2d 310 (1985) at ¶ 8. ("elimination of white and gray areas is a primary objective of the Commission . . .") (subsequent history omitted). See also *Central Florida Educational Found., Inc.*, 7 FCC Rcd 6010 (1992) (provision of service to a gray area will best serve the public interest when compared to alternatives.) (subsequent history omitted).

IV. The Decision of the Allocations Branch Should Be Reversed Because Section 73.3555 of the Commission's Rules Prohibits Clear Channel from Constructing the Proposed Facilities

Subsequent to the initial request to move KRVI(FM) to Barnesville, Clear Channel acquired the construction permit for new station KCHY, Hope, North Dakota.²⁸ Allowing the relocation of KRVI(FM) to its proposed transmitter site will result in a substantial city-grade overlap of KRVI(FM) with Clear Channel station KCHY(FM).²⁹ As a result of the proposed reallocation, Clear Channel will own seven stations in the Fargo - Moorhead market, including five FM stations, in violation of Section 73.3555 of the Commission's rules.³⁰ Therefore, the Allocations Branch has granted an allocation for which Clear Channel cannot apply, wasting the Commission's limited resources.³¹ Clearly, when there is an expression of interest in the use of a new channel, and that expression of interest is incapable of being fulfilled, the proposed allotment can not be made.³² Moreover, although Clear Channel has elsewhere indicated that it

²⁸ On December 20, 2000, Monterey filed a Petition to Deny the Application and a Reply to Opposition to Petition to Deny on January 17, 2001, demonstrating that the proposed assignment of the KCHY(FM) permit from Michael Radio Group to Clear Channel was inconsistent with Commission Rules and policy. Subsequent to the MMB's grant of the Application, Monterey filed an Application for Review with the Commission on June 25, 2001 that further describes the important public interest considerations that preclude Clear Channel's acquisition of KCHY. The Application for Review remains pending before the Commission.

²⁹ See Triad's Comments, Appendix A, Engineering Statement of Roy Stype, III at Fig. 1.

³⁰ See 47 C.F.R § 73.3555(a)(1)(ii). These stations are as follows: KVOX(AM), Moorhead, Minnesota, KFGO(AM), Fargo, North Dakota, KULW(FM), Kindred, North Dakota, KFGO-FM, Fargo, North Dakota, WDAY-FM, Fargo, North Dakota, and KRVI(FM), Detroit Lakes, Minnesota.

³¹ The reference coordinates specified in this rulemaking are such that the city grade contours of these stations will overlap. Unless Clear Channel renounces its intent to construct the facilities specified in the instant rulemaking, both that proposal and the KCHY acquisition cannot be accomplished without violating the FCC's multiple ownership rules.

³² See *Kellnersville and Two Rivers Wisconsin*, 13 FCC Rcd 828 (1998) ("We point out that a basic requirement of a rule making proceeding for an FM allotment proposal is a

Footnote continued on next page

will propose a change in the coordinates of the reallocated KRVI, it has not made such a proposal in this proceeding. Even if it did so, such an amendment of its proposal must be rejected, as the proposals must be in their complete, final form by the date set for the filing of counterproposals in a proceeding.³³ Because the proposed reallocation will result in a violation of the Commission's multiple ownership rules, Clear Channel's statement of intent to apply for the channel cannot be credited. Triad requests that the Commission reverse the Allocations Branch decision to reallocate KRVI(FM) to Barnesville.

Footnote continued from previous page

statement of interest in the channel requested. We will not allot a channel in the absence of an assurance that a party will file an application for the allotment) at ¶ 4. If the Commission should determine that a change in reference coordinates is allowed, the Commission should require that such change be at coordinates which allow for the Enderlin allotment which, as shown above, better serves the public interest than the Barnesville reallocation.

³³ See, e.g. *Caldwell, College Station and Gause, Texas*, FCC 00-374 (released Oct. 27, 2000) ("we will not permit a rulemaking proponent to perfect its proposal after the comment date to the prejudice of another party"); *Santa Margarita and Guadalupe, California*, 4 FCC Rcd 7887 (MM Bur. 1989).

CONCLUSION

In sum, the Report and Order proposes what the Commission said it would not do: “adhere rigidly to the concept of localism.” The Report and Order’s reliance on Barnesville’s alleged local needs is particularly dubious in light of the obvious fact that the reallocated KRVI(FM) is actually meant to serve the larger Fargo-Moorhead Urbanized Area. The Allocations Branch also ignored substantial evidence demonstrating Barnesville’s interdependence with the Fargo-Moorhead Urbanized Area and erred in its conclusion that allocating Channel 236C1 to Barnesville is a preferential arrangement than allotting Channel 233C1 to Enderlin. Finally, the decision of the Allocations Branch cannot be sustained as it results in a violation of the Commission’s multiple ownership rules. Accordingly, Triad respectfully requests that the Commission reverse the decision of the Allocations Branch in this matter and the request to allot Channel 236C1 to Barnesville.

Respectfully submitted,

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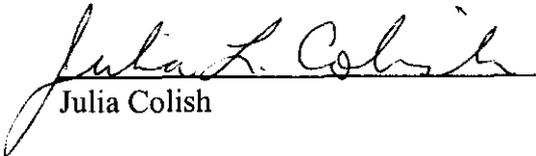
CERTIFICATE OF SERVICE

I, Julia Colish, a secretary with the law firm of Shaw Pittman LLP, hereby certify that copies of the foregoing "**PETITION FOR RECONSIDERATION**" were served on this 7th day of February 2002 to the following:

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