DOCKET FILE COPY ORIGINAL

LAW OFFICES
GARVEY, SCHUBERT & BARER
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS

SEATTLE
EIGHTEENTH FLOOR
1191 SECOND AVENUE
SEATTLE, WASHINGTON 98101-2939
(206) 464-3939

FIFTH FLOOR
1000 POTOMAC STREET N.W
WASHINGTON, D.C. 20007
(202) 965-7880

FAX: (202) 965-1729

PORTLAND
ELEVENTH FLOOR
121 S.W. MORRISON STREET
PORTLAND, OREGON 97204-3141
(503) 228-3939

PLEASE REPLY TO WASHINGTON, D.C OFFICE

JOHN M. PELKEY
WASHINGTON, DC OFFICE

DIRECT DIAL (202) 298-2528

E-MAIL ADDRESS
jpelkey@gsblaw.com

July 11, 2002

RECEIVED

JUL 11 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

OUR FILE NO.
20828-00101-63
1554-101-63

Marlene H. Dortch, Secretary
Federal Communications Commission
Mass Media Services
P. O. Box 358190
Pittsburgh, PA 15251-5190

RE: Petition for Reconsideration and Clarification
MM Docket No. 00-245
MainQuad Broadcasting, Inc.

Dear Ms. Dortch:

Transmitted herewith, on behalf of MainQuad Broadcasting, Inc. ("MainQuad"), are an original and four copies of its **PETITION FOR RECONSIDERATION AND CLARIFICATION** in the above-referenced rulemaking proceeding.

If there are any questions concerning this submission, please contact the undersigned directly.

Sincerely,

John M. Pelkey

Enclosures
JMP/blr

No. of Copies rec'd 0+4
List ABCDE

RECEIVED

JUL 1 1 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before The

Federal Communications Commission

Washington, D.C. 20554

In the matter of	]	
	]	
Amendment of Section 73.202(b),	]	MM Docket No. 00-245
Table of Allotments,	]	RM-9971
FM Broadcast Stations,	]	RM-10185
(Alberta and Dinwiddie, Virginia,	]	RM-10186
Whitakers and Garysburg, North Carolina)	]	

To: Chief, Allocations Branch

Petition for Reconsideration and Clarification

MainQuad Broadcasting, Inc. ("MainQuad"), through counsel, hereby petitions the Commission for reconsideration and clarification of its May 17, 2002, *Report and Order*[1] in the above-referenced proceeding wherein the Commission ignored the need for additional service to 127,000 people in favor of providing first local service to less than 400 people more than would receive such service under MainQuad's proposal as set forth in MainQuad's Petition for Rulemaking. In so doing, the *Report and Order* failed to fully consider (1) the fact that the Commission has explicitly held that the provision of first local service to such a small number of people is *de minimis* when compared to the provision of additional service to more than 100,000 people and (2) the fact that MainQuad has already proposed to provide first local service to Garysburg by changing the community of license of its WPTM(FM), a station of which affiliate MainQuad Communications, Inc., is licensee. As a result, the *Report and Order* is decided solely on the basis of local service to a relatively few number of people – all of whom are more

than adequately served by nearby radio stations, and who will soon have their own community station in the form of WPTM(FM). Thus, MainQuad submits that its proposal and not Garysburg's would best serve the public interest and respectfully requests that the Commission reconsider its decision.

If the Commission decides not to grant reconsideration of the *Report and Order*, however, there is one crucial aspect of the *Report and Order* which requires clarification. Specifically, although the *Report and Order* acknowledges the relevance of *Circleville, Ohio*,[2] to the issue, it fails to explain and order that, as required by *Circleville*, the ultimate permittee of the Garysburg station must pay MainQuad for its expenses in effectuating the change. This omission could result in a situation where prospective applicants for the Garysburg allocation could be unaware of the fact that they are required by *Circleville* to reimburse MainQuad and place bids under false assumptions as to the value of the allocation. To avoid this situation, the ordering clauses should be modified to specify that the ultimate permittee of the Garysburg allocation is required to reimburse MainQuad for its expenses in changing channel.

I. Background.

MainQuad, permittee of WSMY-FM, Alberta, Virginia, requested that the Commission modify the Table of FM Allotments so as to upgrade WSMY-FM's channel from Class A to Class C3 status and to reallocate the upgraded channel from Alberta, Virginia, to Whitakers, North Carolina. At the same time, so as to ensure that Alberta

---

[1] The Report and Order appeared in the Federal Register of June 11, 2002, with the result that this Petition for Reconsideration, being filed within 30 days of June 11, 2002, is timely filed.

[2] 8 FCC2d 159 (1967).

received service, MainQuad proposed that Channel 299A be allotted to Alberta and committed both to apply for that channel if it were allocated to Alberta and to construct the new Alberta facilities promptly if MainQuad were awarded the Alberta Channel 299A construction permit.

In response to MainQuad's proposal, two unincorporated entities, calling themselves Garysburg Radio and Dinwiddie Radio Company ("DRC"), submitted counterproposals seeking to thwart the substantial public interest benefits inherent in MainQuad's proposal. Garysburg Radio asked the Commission to allocate a new channel to Garysburg, North Carolina, instead of Whitakers, whereas DRC sought to have the channel allocated to Dinwiddie, Virginia, rather than Whitakers. Although Garysburg has approximately 450 more inhabitants than Whitakers, the MainQuad proposal would provide additional service to approximately 127,000 more people than the Garysburg Radio proposal. Dinwiddie is an unincorporated community and, according to the *Report and Order*, has a population of only 200 people. Because DRC proposes first local service to a community that is smaller than either Whitakers or Garysburg and proposes coverage that is inferior to that provided by either the MainQuad or Garysburg Radio proposal, no further consideration will be given to the DRC proposal in this Petition for Reconsideration.

In order to ensure that Garysburg would enjoy all of the rights and privileges associated with having a broadcast facility allocated to it, MainQuad Communications, Inc. ("MCI"), which is a MainQuad affiliate, filed with the Commission a Petition for Rulemaking on February 8, 2002, in which it proposed to change the community of license of its WPTM(FM) from Roanoke Rapids to Garysburg.

Thus, the public interest benefits of the MainQuad and Garysburg Radio proposals can be set forth in tabular form as follows:

Proposal:	MainQuad	Garysburg Radio
First local transmission service for Garysburg	Yes	Yes
Continued First Local Transmission Service for Alberta	Yes	Yes
First local transmission service for Whitakers	Yes	No
Creation of Class C facility on Channel 276 with concomitant service to 188,344 people (in excess of 127,000 people more than would be served by a Class A facility in Garysburg)	Yes	No

Because, as graphically set forth above, MainQuad's proposal better serves the public in every way, MainQuad asks that the Commission reverse the *Report and Order* adopting the Garysburg Radio proposal and, instead, adopt the MainQuad Petition for Rulemaking.

II. The *Report and Order* is Devoid of a Rational Basis.

The *Report and Order*'s decision to adopt the Garysburg Radio proposal is dependent on two conclusions. First, the *Report and Order*, relying on *Blanchard, Louisiana, and Stephens, Arkansas*, 10 FCC Rcd 9828 (1995) ("*Blanchard*") and *Rose Hill, et al., North Carolina*, 11 FCC Rcd 21223 (1966), affirmed, 15 FCC Rcd 10739 (2000), application for review denied, 16 FCC Rcd 15610 (2001) ("*Rose Hill*"), finds that the Commission's *de minimis* standard for analyzing FM allocations does not apply in the present case. Second, the *Report and Order* refuses to consider the fact that Garysburg is

not in need of first local service given the willingness of MainQuad to change WPTM's community of license – a change that can be effectuated from WPTM's current transmitter site on WPTM's current assignment. Neither rationale for adopting the Garysburg Radio proposal can withstand scrutiny, however.

A. Reliance on *Blanchard* and *Rose Hill* is Misplaced.

In relying on *Blanchard*, the *Report and Order* ignores the history of that case. *Blanchard* was adopted by the Commission on July 31, 1995. On that very same day, the Commission also adopted its decision in *Seabrook, Huntsville, Bryan, Victoria, Kennedy and George West, Texas,* 10 FCC Rcd 9360 (Comm 1995) ("*Seabrook*"), wherein the Commission found that the proposed provision of second full-time aural service to 455 persons (which normally triggers priority 2 of the Commission's FM priorities) would be considered to be *de minimis* in view of the fact that the competing proposal proposed additional service to 144,000 more persons than the proposal that would provide second full-time aural service to 455 persons. Because *Blanchard* and *Seabrook* were adopted by the Commission itself (i.e., not by the staff) on the same day, they must be read in such a way as to harmonize with one another. The most harmonious reading is obvious: while the proponent proposing the greater first local service will usually prevail, the differential between proponents in that regard can be so small as to be *de minimis* when other factors are taken into account. That is precisely the situation in the present case. As a result, MainQuad's proposal would be preferable to Garysburg Radio's even if MainQuad were not proposing to provide first local service to *both* Whitakers and Garysburg.

Reliance on *Rose Hill* is similarly misplaced. *Rose Hill* only involved a comparison of first local service to two different communities, one with a population of

284 people and the other with a population of 654 people. Unlike the case here, there was no proponent proposing new service to more than 127,000 additional people. The present case is far more like *Seabrook* than *Rose Hill*. In *Seabrook* the Commission squarely confronted the issue of how to compare two proposals where one of the proposals would provide second full-time aural service, which is given the same weight as the provision of first local service, to 455 persons more than the second proposal, but the second proposal would provide additional service to 144,000 persons more than the first proposal. The resolution adopted by the Commission in *Seabrook* was to find that the provision of second full-time aural service to 455 persons was *de minimis* compared to the provision of additional service to 144,000 people. In fact, *Seabrook* and the present case have become eerily similar now that the 2000 census figures have come out in the years that the present case has been pending before the Commission. In both cases, the issue was how to treat a significant difference in the coverage proposals of two applicants when the applicant proposing the inferior coverage was also proposing service that would trigger allotment priorities 2 or 3. Second full-time aural service, which was the relevant priority in *Seabrook*, is given the same weight as first local service, which is the relevant priority in the present case. The number of persons receiving second full-time aural service in *Seabrook* was 455 persons; based upon the 2000 Census figures used in the *Report and Order*, the number of additional people receiving first local service under the Garysburg Radio proposal also would be 455 persons. The number of additional people receiving service in *Seabrook* was 144,000; the number of additional people receiving service in the present case 127,213. The figures, in other words, are virtually identical.

Confronted with this situation, the *Report and Order* seeks to distinguish the present case by claiming that *Seabrook* was decided under allotment priority 4, whereas the present case is being decided under allotment priority 3. With all due respect, that explanation simply does not wash. What the Commission was saying in *Seabrook* was that there must be a modicum of reason applied to its allocation processes. If the Commission had wanted nothing more than a "count the heads" approach, the *Seabrook* decision would have come out just the opposite of the way that it did because the proponent with the inferior coverage would have "won" under allotment priority 2. There never would have been a need to consider allotment priority 4. The very reason the case was decided under allotment priority 4 was that the number of people who would receive second aural service was so small that the Commission could not in good conscience decide the case under allotment priority 2. If 455 people were too few to sustain treating *Seabrook* as an allotment priority 2 case, they are also too few to sustain treating the present case under allotment priority 3.[3]

B. MainQuad has Proposed Everything that Garysburg Radio Has, and Then Some.

As is noted above, MainQuad Communications, Inc., which is a MainQuad affiliate, has proposed to provide first local service to Garysburg by changing the community of license of WPTM(FM), a station of which MainQuad Communications,

[3] The staff also appears to be under the misperception that, if a community is well-served, *Seabrook* does not apply. That analysis compares apples and oranges. The question in Seabrook is not whether the community to which the allocation would be made is well-served, but which of the two proposals provides additional service to more people *regardless of the communities in which they reside.*

Inc., is licensee, from Roanoke Rapids, North Carolina, to Garysburg. Because the proposal does not require either a channel change or a change in transmitter site or other facilities to provide the requisite city-grade signal and because Roanoke Rapids is home to four other radio stations, there is virtually no scenario under which that rulemaking would not result in the provision of first local service to Garysburg by WPTM(FM). As a result, unlike situations where a party is relying upon a rulemaking involving facilities changes or involving unrelated parties, the MainQuad WPTM(FM) proposal is not premised upon a speculative proposal that may or may not come to fruition. As a result, the *Report and Order*'s characterization of the WPTM proposal as "speculative" is incorrect and, unfortunately, has the effect of severely and adversely affecting the public interest. When MainQuad's original proposal is considered along with its proposal to reallocate WPTM(FM) to Garysburg, it becomes apparent that MainQuad's proposals would far better serve the public interest than would the Garysburg Radio proposal inasmuch as MainQuad's proposals would result in first local service to both Whitakers and Garysburg and would provide increased service to an additional 127,000 people. Because of this marked superiority of the MainQuad proposals, the Commission should reconsider its refusal to consider MainQuad's proposal for the allocation of WPTM(FM) to Garysburg.

III. In the Unlikely Event that the Commission Denies MainQuad's Request for Reconsideration, The Commission should Clarify the *Report and Order* to Make it Clear that the Ultimate Permittee of the Garysburg Construction Permit is Obligated to Pay MainQuad for the Expenses Incurred by it in Changing WSMY-FM's Channel.

Circleville, Ohio, holds that, whenever a licensee is forced to change channel in order to accommodate a new allocation, the party that is awarded that allocation is

required to pay the licensee for the expenses incurred by it in effectuating the channel change. 8 FCC2d at 163. Unfortunately, the *Report and Order* does not clearly articulate that responsibility and the ordering clauses are silent on the point. In the present case, MainQuad's engineers have informed it that the cost of changing channel will exceed $40,000 because the difference in frequency is great enough that the present antenna cannot be used and the other transmission equipment will need to be retuned at the factory and re-installed.

Given the fact that the Garysburg allocation would be awarded through auction, it is vital that potential bidders be made aware of their responsibility to pay MainQuad so that the cost of such payment can be taken into account in calculating a reasonable bidding price. In the absence of such notice from the Commission, bidders could reasonably argue that they had not been provided with accurate information by the Commission – thus potentially paving the way for defaults. The situation is one that can be avoided by taking appropriate action now by way of clarifying the *Report and Order*.

Conclusion

It is now clear beyond cavil that the MainQuad proposal should have been preferred. It provides first local service to more people. It provides additional received service to more people. It allows for the residents of Alberta to continue to receive first local service. It allows the citizens of Garysburg to receive first local service more quickly. It is in all respects a proposal that better serves the Commission's allotment

priorities. As a result, the Commission should reconsider the *Report and Order* and adopt the MainQuad proposal.

Respectfully submitted,

MAINQUAD BROADCASTING, INC.

By: _____
John M. Pelkey

Garvey, Schubert & Barer
1000 Potomac Street, NW
Fifth Floor
Washington, DC 20007
202/965-7880

July 11, 2002

CERTIFICATE OF SERVICE

I, Barbara L. Rascon, a legal assistant in the law offices of Garvey, Schubert & Barer, hereby certify that I have on this 11th day of July, 2002, sent copies of the enclosed **"PETITION FOR RECONSIDERATION AND CLARIFICATION"** by hand-delivery or first-class, United States mail, postage prepaid, to the following:

*R. Barthen Gorman
Federal Communications Commission
Mass Media Bureau
445 12th Street, SW, Room 3-A224
Washington, DC 20554

Anne Goodwin Crump, Esq.
Fletcher Heald & Hildreth, P.L.C.
1300 North 17th Street, 11th Floor
Arlington, VA 22209-3801
(Counsel for Garysburg Radio)

John D. Poutasse, Esq.
Leventhal, Senter & Lerman P.L.L.C.
2000 K Street, NW, Suite 600
Washington, DC 20006-1809
(Counsel for Dinwiddie Radio Company)

Barbara L. Rascon

*Hand Delivery
July 11, 2002