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Before **the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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| In the Matter of | ) | |
| | ) | |
| Amendment of Section 73.202(b), | ) | MB Docket No. 02-295 |
| Table of Allotments, | ) | RM-10580 |
| FM Broadcast Stations. | ) | |
| (Gonzales, Houma and Westwego, Louisiana | ) | |
| and Hattiesburg, Mississippi) | ) | |

To: Chief, Audio Division
Media Bureau

**MOTION TO ACCEPT COMMENTS AS TIMELY FILED**

Guaranty Broadcasting Company, LLC ("Guaranty"), by its attorneys, hereby respectfully request the Commission to accept as timely filed its Opposition Comments with Alternative Proposal (the "Comments") and consider them in the captioned proceeding. A complete copy of the Comments is attached hereto as Attachment I.

These Comments were submitted to the Commission in both ASCII and PDF format by e-mail to Peter Doyle, Chief and John A. Karousos, Assistant Chief, Audio Division, Media Bureau yesterday, November 18,2002, which was the Comment Date set forth in the NPRM in this proceeding. The Comments were ultimately submitted by this filing method after repeated attempts to file through the Commission's Electronic Comment Filing System ("ECFS"), via both the World Wide Web and e-mail in accordance with the Commission's electronic filing instructions, proved futile. Each such attempt resulted in an error message indicating the that the docketed proceeding was either invalid or unavailable for submission through ECFS.

The Comments were filed in conjunction with two other interrelated pleadings, which were filed by hand delivery with the FCC yesterday by the 7:00 pm paper filing deadline and

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served on the petitioner in this proceeding (the "Petitioner"). See Petition for Consolidation and Petition for Rule Making attached as Attachments II and III. In furtherance of the Commission's efforts toward facilitating public access in open proceedings, however, Guaranty elected to file the Comments electronically.

The NPRM and the initial petition in this proceeding are docketed in ECFS, and both ECFS and the text of the NPRM suggested that this was an acceptable method of filing responsive Comments. On its website, the Commission unequivocally states that "ECFS will: accept electronic comments in FCC rulemakings and docketed proceedings . . ."[1] This proceeding is both docketed and a rulemaking. The Commission further states on its website that "before ECFS became available, commenters were invited to file electronic copies of their filings in ***certain*** proceedings," suggesting that electronic filing is now available in **all** docketed FCC rulemaking proceedings.*

There is absolutely nothing in the ECFS Home Page to conflict with this interpretation. In fact, the ECFS Home Page states: "ECFS only accepts filings in proceedings with docket and rulemaking numbers. ECFS is therefore unable to accept filings in non-docketed proceedings."[3] There is no hint that ECFS cannot be used to file in a proceeding such as this, which has both docket and rulemaking numbers. Nor is there any suggestion in either the ECFS User Manual or the ECFS Frequently Asked Questions materials that Guaranty's timely filing in a docketed rulemaking would be unacceptable or invalid.

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[1] See http://www.fcc.gov/cgi-bin/EFBoards/systemstatus.cgi?index_t=%2e%2e/%2e%2e/pub/e-file/EFBoards.html, visited November 18,2002.

[2] Id. (emphasis added).

[3] See http://www.fcc.gov/e-file/ecfs.html, visited November 18,2002.

Further, the NPRM reference to **"parties who *choose* to file [comments] by paper,"** would make no sense unless commenters had a choice of filing methods. NPRM at para. 11 (emphasis added). The only other known method acceptable for the submission of comments in docketed proceedings to the Commission is ECFS. The Appendix to the NPRM requires only that Comments be in written format, without addressing any required means of delivery, Appendix at para. 4, and there is nothing in ECFS or in the text of the NPRM that qualifies these statements or otherwise precludes the electronic filing of comments in this proceeding.

While the FCC rule that first permitted the electronic filing of comments in petition for rulemaking proceedings excepted comments filed in broadcast allotment proceedings, see 47 C.F.R. §1.49(f)(1)(iii), this exception was created out of a concern that parties in such proceedings would not be properly served and to afford the Commission more experience with its then newly-operational ECFS. See Electronic Filing of Documents in Rulemaking Proceedings, 13 FCC Rcd 11322 at note 6 (1998). Those purposes would not be served by a rejection of Guaranty's Comments in this proceeding.

The Commission now has over four years' experience with ECFS, and it is perfectly equipped to accept comments in broadcast allotment proceedings. In fact, right now there is at least one other FM Table of Allotments amendment proceeding listed in ECFS among those proceedings that are open for electronic comment. See Magnolia, Arkansas and Oil City, Louisiana, Notice of Proposed Rule Making, MB Docket No. 02-199, RM 10514 (rel. August 2, 2002). In addition, a copy of this pleading, along with the underlying Comments, is being delivered to the Petitioner by hand this evening, so no party will be prejudiced by the Commission's acceptance of these Comments.

On the other hand, the public stands to be harmed by a failure to accept and consider Guaranty's Comments in this proceeding. The Comments point out serious factual inaccuracies in the proposal before the Commission for consideration, and they therefore contain important information of decisional significance. If this information is ignored, the instant proceeding could result in a decision that is contrary to the public interest.

For these reasons, the Commission should accept Guaranty's Opposition Comments with Alternative Proposal and consider them together with the interrelated Petition for Consolidation and Petition for Rule Making in this proceeding, and such acceptance and consideration is hereby respectfully requested.

Respectfully submitted,

Guaranty Broadcating Company, LLC

By: _____
Richard R. Zaragoza
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Dated: November 19,2002

**ATTACHMENT I**

Before the
Federal Communications Commission
Washington, D.C. 20554

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| (Gonzales, Houma and Westwego, Louisiana | ) | |
| and Hattiesburg, Mississippi) | ) | |

To: Chief, Audio Division
Media Bureau

**OPPOSITION COMMENTS WITH ALTERNATIVE PROPOSAL**

**GUARANTY BROADCASTING COMPANY, LLC**

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Dated: November 18,2002

## SUMMARY

In this proceeding, two subsidiaries of Clear Channel Communications seek to amend the FM Table of Allotments (1) to downgrade WUSW, a Class C FM station allotted to Hatiesburg, Mississippi, to Class C0, and to change its allotted city of license to Westwego, Louisiana, in the heart of the New Orleans Urbanized Area, and (2) to downgrade KSTE-FM, a class C FM station allotted to Houma, Louisiana, to Class C0, and to change its allotted city of license to Gonzales, Louisiana, in the Baton Rouge Urbanized area. Guaranty Broadcasting Company, LLC, believes these proposed changes to the FM Table of Allotments would disserve the public interest and should be denied.

Westwego is not a separate and distinct community, but rather is a small and interdependent part of the New Orleans Urbanized Area. Clear Channel has failed to demonstrate that Westwego qualifies as a "community" under Section 307(b) criteria, and its proposal must be considered for what it is – an attempt by Clear Channel to acquire another New Orleans station – a station it likely could not acquire under current FCC standards.

Similarly, Guaranty shows that, contrary to Clear Channel's assertions, Gonzales is located within the Baton Rouge Urbanized Area. Because Clear Channel has not even tried to demonstrate the independence of Gonzales, that proposal must fail.

Finally, Guaranty proposes a superior alternative to provide Gonzales with its own first local service.

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To: Chief, Audio Division
Media Bureau

**OPPOSITION COMMENTS WITH ALTERNATIVE PROPOSAL**

Guaranty Broadcasting Company, LLC ("Guaranty"), by its attorneys, and pursuant to Section 1.415 of the Commission's Rules, hereby submits its comments in opposition to the *Notice of Proposed Rulemaking in MB Docket No. 02-295*, released by the Commission on September 27,2002 (the "*NPRM*"). Guaranty also submits an alternative proposal regarding the proposed provision of a first local service to the City of Gonzales, Louisiana, which will result in a superior number of public interest benefits to the allotment proposed in the *NPRM*. Guaranty's alternative proposal should be either considered as a counterproposal in this proceeding or, if necessary under the Commission's procedures, as an alternative proposal the resolution of which should be considered on a consolidated basis with the instant proposal.

**Background**

1. On February 25,2002, Capstar TX Limited Partnership, licensee of Station WUSW(FM), Channel 279C, Hattiesburg, Mississippi, and Clear Channel Radio Licenses, Inc.,[1]

[1] Both entities are indirect subsidiaries of Clear Channel Communications, Inc., and hereinafter jointly are referred to as "Clear Channel."

licensee of Station KSTE-FM,[2] Houma, Louisiana, jointly filed a Petition for Rulemaking (the "Petition") seeking to amend the FM Table of Allotments. The petition requested that the Commission downgrade WUSW from Channel 279C to Channel 279C0, move its reference point 193.53 kilometers to the south, and change its city of license from Hattiesburg. Mississippi, to Westwego, Louisiana, an integral part of the New Orleans Urbanized Area. it also requested that the Commission downgrade KSTE-FM from Channel 281C to Channel 281C0, move its reference point 21.93 kilometers to the southwest, and change its city of license from Houma, the central city in the Houma Urbanized Area, to Gonzales, Louisiana, a small city in the Baton Rouge, Louisiana, Arbitron Metro, and near the Baton Rouge Urbanized Area. The Petition resulted in the *NPRM* which is the subject of these Comments.

**Discussion**

2. Guaranty opposes both reallotment proposals. They represent yet two more examples of the growing trend of stripping Class C and B FM channels from deserving communities in smaller, independent advertising markets and moving them dozens or hundreds of kilometers into the core of major advertising markets such as New Orleans and Baton Rouge. This practice is cloaked by claims that it will advance a preferential public interest goal -- providing a first local transmission service to some small constituent community or another in a major Urbanized Area. Careers have been based on the manipulation of the "first local service" priority, and windfall profits by organizations that have taken advantage of such "opportunities." Yet the public interest has not been advanced one iota by such practices.

3. Indeed, as this process of denuding smaller radio markets to feed the insatiable appetite for new major market stations continues to grow, the Commission is faced with a

[2] At the time the Petition was filed, the call sign of the Houma station was KFXN-FM. References herein are to the station's current call sign.

fundamental question: How much longer can the Commission ignore reality by claiming that this process, which clearly exacerbates the existing imbalance in the availability of local FM radio service between "haves" living in larger radio markets and "have-nots" living in smaller markets results in a preferential arrangement of service to the states and the communities under Section 307(b) of the Communications Act of 1934, as amended? Just how long can the Commission bury its head in the sand and ignore the reality of this dramatic reshaping of the FM service across America?

4. The Commission looks with disfavor upon the use of the FM allocation process to move channels from one community to another. ***See*** *Modification of FM and TV Authorizations*, 5 FCC Rcd 7094 (1990). In order to justify such a change, the proponent must prove that a proposed reallotment will result in a preferential distribution of radio facilities under Section 307(b). Section 307(b) requires that the Commission

> make such distribution of licenses . . . among the several States and communities as to provide a fair, efficient and equitable distribution of radio service . . . .

47 U.S.C. § 307(b). That is why Clear Channel has proposed to move its Hattiesburg and Houma stations to Westwego and Gonzales, rather than the real target communities: if it were to admit it was seeking additional New Orleans and Baton Rouge stations, its proposal would be denied summarily. *Its* proposed reallotment is designed to "game the system," *to* take advantage of the alleged need of Westwego and Gonzales for a first local transmission service, a high priority under Section 307(b), without ever proposing studios or other local facilities in

Westwego or Gonzales, and offering no local news or public affairs programming – i.e., a "local service" in name but not reality.[3]

5. In adopting its rules permitting FM stations, such as WUSW and KSTE-FM, to change their cities of license, the Commission stated that it would not permit the 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 with and part of a larger metropolitan area. ***See*** *Modification of FM and TV Authorizations*, 5 FCC Rcd 7094, 7096 (1990). The Commission went on to state that it does

> not intend to apply the first local service . . . blindly. We recognize that an inflexible application of the preference, without further analysis, could consistently result in our finding that a reallotment leading to a first local service for a suburb of a much larger adjacent metropolitan center justifies removing a local service from a more remote community. We wish to dispel any concern that our new rules would lead to such a result.

*Id*. If the Commission intends to remain true to its words, a first service preference cannot be granted to either Westwego or Gonzales under the circumstances of this case. Approval of the reallotments contemplated in the *NPRM* can be made only if the Commission proceeds blindly and ignores the real nature of the pending proposal and the intent of the proponent

6. The Commission has, over the years, attempted to adopt standards to insure that Section 307(b) criteria are applied fairly and rationally. These are reflected in the currently applicable *Huntington*[4] and *Tuck*[5] criteria. Under *Huntington*, where competing applications are filed for separate communities that are dependent upon, and contiguous to, a central city, and the

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[3] There is a track record in this regard that cannot be overlooked. KSTE-FM has already abandoned Houma, its city of license, for New Orleans, over 50 road miles away. The station's studios, offices and public file are located in the city of New Orleans.

[4] *Huntington Broadcasting Co.* v. *FCC*, 192 F.2d 33 (D.C. Cir. 1951).

[5] *Faye & Richard Tuck*, 3 FCC Rcd 5374 (1988).

applicants propose sufficient power to serve the entire metropolitan area, the Commission treats the entire metropolitan area as one community for Section 307(b) purposes.[6] *Tuck* is the most recent attempt by the Commission to clarify the *Huntington* standard. Under *Tuck,* the Commission indicated that **"Urbanized Area is an appropriate definition of 'community"'** under *Huntington*.[7] The Commission also stated that the relationship between a proposed city of license and a larger city is the critical consideration in deciding whether Huntington applies, and that the required showing of interdependence will vary depending on the degree to which the relative size and proximity of the communities in question suggest that the proposed community of license is simply an appendage of a large central city.

7. *Tuck* sets forth the following characteristics to be considered in assessing the interdependence of the proposed community of license with the larger community:

- The extent to which community residents work in the larger metropolitan area, rather than the specified community
- Whether the smaller community has its own newspaper or other media that covers the community's local needs and interests
- Whether community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area
- Whether the specified community has its own local government and elected officials
- Whether the smaller community has its own telephone book provided by the local telephone company or zip code
- Whether the community has its own commercial establishments, health facilities and transportation systems

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6 *Accord, Debra D. Carrigan,* 100 FCC 2d 721, 728-31 (Rev, Bd, k1985), *review denied* 104 FCC 2d 826 (1986), *aff'd sub nom. Interstate Broadcasting System* v. *FCC,* 836 F.2d *826* (D.C. Cir. 1988).

7 *Tuck,* ¶48.

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

- 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.

**Westwego Reallotment**

8. Clear Channel's motive in proposing to move WUSW from Hattiesburg to Westwego is clear enough. Indeed, its intentions are totally transparent: Clear Channel wants to move the station from a community that is located outside all rated Arbitron radio markets, has a population of 44,779, and is located within an urbanized area with a population of only 61,465,' into the heart of the New Orleans Urbanized Area, a top-50 major advertising market' with an Urbanized Area population of population of 1,009,283.'' Such a change would dramatically increase the value of WUSW, and further increase the share of radio advertising revenues held by Clear Channel in the important New Orleans market.'' Equally clear is why Clear Channel seeks to make this change through the allocation process rather than purchasing another FM

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8 U. S. Census Bureau, *Profile of General Demographic Characteristics: 2000. Census 2000 Summary File I (SF 1) 100-Percent Datu, Hattiesburg, MS Urbanized Area.*

9 New Orleans is the 40th ranked radio advertising market by revenue, and is the 44th largest Metro by population. BIA Financial Network, *Investing in Radio 2002. 3rd Edition.*

10 U. S. Census Bureau, *Profile of General Demographic Characteristics: 2000, Census 2000 Summary File I (SF I) 100-Percent Data, New Orleans. LA Urbanized Area.*

11 FCC records show that Clear Channel currently operates 2 AM and 4 FM stations licensed to New Orleans: WODT (AM), 5 kW fulltime; WYLD(AM), 10 kW day, .5 kW night; WYLD-FM, 100 kW; WQUE-FM, 100 kW; WEZB-FM, 100 kW; and WRNO-FM, 100 kW. In addition, Clear Channel is the licensee of 100 kW station WSTE-FM, which places a 70 dBu signal over most of New Orleans; this signal will be diminished somewhat if the instant reallotments are approved.

station in New Orleans: Clear Channel knows it would be difficult or impossible to meet FCC concentration concerns in the context of an assignment or transfer application."

9. Clear Channel claims that "this relocation does not implicate the Commission's policy concerning the potential migration of stations for underserved rural areas to well-served urban areas.'' The case it cites for that proposition[13] does not stand for the principle that allotted stations all smaller Urbanized Area are fair game to be moved into larger urban areas. To the contrary, the Commission has required applicants proposing to move a station from a smaller Urbanized Area to a smaller community in a large Urbanized Area to demonstrate the independence of the smaller community. *Kankakee and Park Forest, Illinois,* DA 99-2563 (Released December 15, 1999) (proposal to move from Kankakee Urbanized Area to Park Forest, a community within the Chicago Urbanized Area requires showing Park Forest is separate from, and not interdependent with, Chicago).

10. The Clear Channel Petition contains a feeble *Tuck* showing in an attempt to avoid the Commission's recognition of a truth any resident of the New Orleans area would find obvious: that Westwego is an interdependent part of the New Orleans Urbanized Area, and that the Urbanized Area should be recognized **as** its community of license for allocation purposes.

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12 Indeed, earlier in 2002, Clear Channel sought to "swap" station KKND(FM), a 100kW station licensed to Port Sulphur, Louisiana, for 100kW station WRNO-FM, New Orleans. The application was "red-flagged" over Commission concerns that even a station swap in the highly concentrated New Orleans radio market would give Clear Channel an inappropriate share of advertising revenues. See Exhibit . According to information filed by the other party to the proceeding, Clear Channel had a 36% share of the New Orleans market revenues, and another party had 46.5%. See Exhibit **A.** Of course, the proposal to move WUSW to a location with reference points very near to the existing transmitter sites of Clear Channel's New Orleans FM stations offers the potential to dramatically increase revenues over those generated by KSTE-FM, which has been unable to provide **a** strong signal to the entire New Orleans Urbanized Area due to spacing constraints, and which Clear Channel now seeks to move further west to serve the Baton Rouge area.

13 *Elizabeth City, North Carolina and Chesapeake, Virginia,* 9 FCC Rcd 3586 (1994)

The Petition is replete with numerous instances of misleading assertions by the proponent. More importantly, Clear Channel's ***Tuck*** showing contains a number of serious and materially false statements. These destroy any credibility which the study might otherwise be accorded.

11. The failure of Clear Channel to demonstrate that Westwego is independent from, and not interdependent with, the New Orleans Urbanized Area can best be shown by a review of each of Clear Channel's arguments. First, it makes three generalized arguments under *Huntington:*

- "Westwego . . . is 27 kilometers away from New Orleans.[14]" **This is blatantly false!** In fact, the boundaries of Westwego and New Orleans adjoin! Westwego is located directly across the Mississippi River from the area of New Orleans in which Tulane University, Loyola University, Audubon Park Zoo and one of the most exclusive residential areas of New Orleans are located." Indeed, none of the maps submitted in Exhibit A of the Petition identify the City of New Orleans in relation to Westwego. While Guaranty cannot speculate as to Clear Channel's motives, the result is that a casual reader of Exhibit A of the letter would have no way to realize the falsity of this claim. Contrast Attachment I, which shows the Urbanized Area in relationship of New Orleans on Westwego.

- "Westwego . . . [is] located in Jefferson Parish . . . .[and] New Orleans. . . [is] located in Orleans Parish."[15] While true, this is meaningless. New Orleans has been space constrained for many years by the boundaries of Orleans Parish, and the practical difficulty of expanding into any undeveloped areas, which are very low (the entire city is below sea level

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14 Petition, at 4.

15 While there is no direct bridge across the Mississippi River at Westwego, the closest bridge across the Mississippi has been located at Bridge City, immediately adjacent to Westwego, for over 60 years, and it is nowhere near 27 kilometers from Westwego to the City of New Orleans over that bridge, or using the Gretna ferry. In any event, under ***Tuck,*** the question is the interdependence of Westwego with the entire New Orleans Urbanized Area. ("Urbanized Area is an appropriate definition of 'community' under *Huntington.")* Westwego is an integral part of the area known as the "Westbank" which stretches continuously along the Mississippi River in Jefferson, Orleans and Plaquemines Parishes (including Algiers, Gretna, Harvey, Marrerro, Westwego and other communities) across the River from the "Eastbank," which consists of the eastern portion of Jefferson Parish, the City of New Orleans, and portions of St. Bernard Parish.

16 Petition, at 4.

and depends on extensive levees and massive pumping facilities to prevent immediate flooding) and marshy. There is simply no new area to annex. The vast majority of growth for decades in the metropolitan area has been in Jefferson Parish. A majority of the population now lives in Jefferson Parish.[17] In any event, this argument overlooks the key point that, for *Huntington* purposes, the specified community must be contrasted with the Urbanized **Area,** not the largest city in the Urbanized Area. See paragraph 6, *supra.*

- "The 2000 Census population of Westwego (10,673) is 2.2 percent of the population of New Orleans (484,674). Again, this is true, but irrelevant. While this shows the tiny size of Westwego, it is more appropriate to compare it to the population of the Urbanized Area, which is 1,009,283." Using the appropriate comparison, it is clear that the specified community population is only about 1 percent of the community for *Huntington* purposes.

12. Clear Channel's showing under the *Tuck* criteria equally is unavailing.

- <u>The extent to which community residents work in the larger metropolitan area, rather than the specified community.</u> The vast majority of Westwego residents work elsewhere in the Urbanized Area, not in Westwego. According Clear Channel's own data, only 20% (794) of the workers living in Westwego (3,307) work in that place.'"

- <u>Whether the smaller communitv has its own newspaper or other media that covers the community's local needs and interests.</u> Clear Channel's claim that Westwego has its own media is misleading. to day the least. *The Westwego Picayune* cited by Clear Channel is not an independent publication, but merely a small, twice-weekly insert in the *The* ***New Orleans*** *Tines-Picayune,* the dominant newspaper of New Orleans and the entire New Orleans Urbanized Area. Even the claim that *The Westwego Picayune* focuses on local government, business and community news in Westwego is suspect. An examination of the portion included in Exhibit A to the Petition shows that the masthead also lists the communities of Avondale, Bridge City, Nine Mile Point and Waggaman, and a review of the four articles shown on the November 8,2001, page shown in Exhibit shows articles about a book signing in Harvey, Louisiana, a prayer service in a Gretna, Louisiana, church, and a column entitled "Avondale Action." Not a single story deals with Westwego. Similarly, the five page print

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17 According to the 2000 U.S. Census, the population of New Orleans is 484,674, and that of Jefferson Parish is 455,466.

18 See fn. I0, *supra.*

19 Petition, Exhibit A, citing *factfinder.census.gov/servlet/DTTable?_ts=23301030604.*

from the internet, from ***The Times-Picayune,*** entitled *Westwego Picayune* ***News*** for November 4 and 8,2001, shows 44 entries. Stories feature New Orleans, Gretna, Marrerro, Slidell, Harvey, Algiers, Lafitte, the West Bank, Orleans Parish, and Jefferson Parish. **A** review of the current listings, for November 17 and 14,2002, show a similar paucity of news relating to Westwego." In no way can this be said to represent a media outlet centered on Westwego.

- Whether community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area. Clear Channel showing under this criterion is to attribute a statement from the City's Mayor, Robert E. Billiot, that residents of Westwego perceive their city as a separate community, distinct from New Orleans. No affidavit is submitted to support this attribution. Instead, there is a single quote from Mayor Billiot's web site, that "I work with all my energy to make Westwego **a** better place for all of us to live. Our entire community has been united by the fact that Westwego is a great place to live in, and it is our obligation to make it even better for those who come after us."[21] This hardly says that Westwego is separate from and not an integral, interdependent part of the New Orleans Urbanized Area. Indeed, the official Jefferson Parish web page, which covers the entire parish (county) in which Westwego is located, describes Jefferson Parish as "New Orleans' first suburb – a bedroom community west of the city that received the first great migration of middle –class families from the 1950's to the 1970's."[22] Also. local government compiles demographic data is compiled for the entire "Westbank" area of Jefferson Parish.[23]

- Whether the specified community has its own local government and elected officials. Guaranty does not dispute that Westwego is a municipal entity under Louisiana law, and therefore it has its own city government and elected officials. It must be recognized, however, that Westwego is subject to the authority of other regional governmental entities with power far beyond the boundaries of Westwego. These include the Jefferson Parish Council, the Jefferson Parish President, the Jefferson Parish Sheriff, the Jefferson Parish District Attorney, the Jefferson Parish Assessor, the Jefferson Parish Public School Board, the Jefferson Parish Coroner, the Jefferson Parish Clerk of Court and many other entities legally separate

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20 See Exhibit B.

21 Petition, Exhibit A, citing ***http://www.rebilliot.com/.***

22 See Exhibit C.

23 *Id.*

from the Jefferson Parish Council with jurisdiction over Westwego activities.[24]

- Whether the smaller community has its own telephone book provided by the local telephone company or zip code. Clear Channel claims that Westwego has two telephone directories, published by BellSouth and Sunshine Pages. **This is another example of false or misleading information** used by Clear Channel to support its claim. In fact, there are no print telephone directories specifically for the community of Westwego. According to the reference librarian of the Jefferson Parish library, BellSouth does not publish a separate directory for Westwego; entries are included in the directory which covers the entire Greater New Orleans area. The ***sunshinepages,*** published by EATEL, cover "The Complete WestBank."[25] The area encompassed by that directory includes the West Bank area of Jefferson Parish, including Bridge City, Gretna, Harvey, Marrero, Lafitte, Barataria, Grand Isle, and Westwego, as well as all of Plaquemines Parish, from Belle Chasse to Burrwood. While two zip codes serve Westwego, zip code 70094 is shared with Bridge City, and zip code 70096 is shared with Waggaman.[26]

- Whether the community has its own commercial establishments, health facilities and transportation systems. Westwego does have the typical facilities of a bedroom community, including restaurants, supermarkets, gas stations, and other service industries. There are few significant non-service businesses, and those cited by Clear Channel are based on the New Orleans regional economy and the Mississippi River upon which it depends, not on Westwego demand. There are no hospitals in Westwego; residents must travel outside Westwego to other parts of the Urbanized Area for hospital treatment.[27] Nor does Westwego have an independent transportation system. It is served by Jefferson Transit, a Jefferson Parish transit system that provides service into central New Orleans from Westwego.[28]

- The extent to which the specified community and the central city are part of the same advertising market. This factor is ignored by Clear Channel. Westwego is not a distinct advertising market. It is entirely encompassed by the New Orleans advertising market. Both Neilsen (television) and

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24 See Exhibit D.

25 See Exhibit E.

26 See Exhibit F.

27 See Exhibit G.

28 See Exhibit H.

Arbitron (radio) include all of Jefferson Parish, including by definition. Westwego, in the New Orleans Metro market.

- 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. Clear Channel admits that Westwego relies on other parts of the New Orleans area for key governmental services. While there is a local police and fire department, those services rely heavily on the West Jefferson Sheriffs Office and Fire Department for assistance, and the West Jefferson Sheriffs Office has primary jurisdiction over many matters. Despite the gloss given by Clear Channel, the fact is that Westwego has no municipal public schools (they are provided by Jefferson Parish under control of the Jefferson Parish School Board) or libraries (again provided by the Jefferson Parish Library System). Students desiring to attend public high school must leave Westwego to attend West Jefferson High School or another area school.

In sum, there is simply no rational basis for concluding that Westwego is a separate, independent community not interdependent with the rest of the New Orleans Urbanized Area. It is about as independent from the New Orleans Urbanized Area as Cbevy Chase Village is from the Washington, D.C., Urbanized Area. Grant of the proposed allotment change to move WUSW-FM over 100 miles from Hattiesburg to Westwego would constitute an egregious example of manipulation of the Commission's allotment criteria by granting a Section 307(b) first local service preference in a situation where a preference is sought for an urban community - Westwego – that is interdependent with and part of a larger metropolitan area – New Orleans The fair, efficient and equitable division of this nation's radio resources, as well as obvious public interest principles, demands that the proposed reallotment, which would deprive the citizens of Mississippi of a vital service, be denied.[29]

[29] As set forth below, should the Commission for some reason desire to allot the WUSW frequency to Westwego, there is no reason to deprive Houma of its second local FM station. This pleading presents the Commission with an alternative that would allow KSTE-FM to remain at Houma, while providing allotments to Westwego and Gonzales.

## Gonzales Reallotment

13. The reasoning behind Clear Channel's proposed reallotment of KSTE-FM from Houma to Gonzales is much less apparent than the reasoning behind its move of WUSW-FM from Hattiesburg to Westwego. Upon initial analysis, any observer would have to ask: Why would Clear Channel propose to reallot its 100 kW station from Houma to Gonzales, Louisiana? After all, Houma has been a fast-growing community, with a 2002 population of 32,393.[30] Gonzales, population 8,156,[31] has a population only one-quarter as great as Houma. Moreover, Houma is the hub of an Urbanized Area of 125,929,[32] while, according to Clear Channel's Petition. Gonzales is outside of all Urbanized Areas.[33]

14. It certainly can't be that Gonzales has a more vibrant economy than Houma. Houma is a major regional medical center, with two major hospital centers, and is one of the primary worldwide hubs of the offshore oil industry.[34] Based on Clear Channel's Petition, it appears that the main claim to fame of Gonzales is being the "Jambalaya Capital of the World," and a bedroom community for workers at industrial plants located along the Mississippi River (but outside of Gonzales)[35]. The local advertising market is similarly imbalanced. Houma has far fewer nearby broadcast outlets, and is the home of an extremely successful daily newspaper,

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30 Petition, at 11.

31 Id.

32 U. S. Census Bureau, *Profile of General Demographic Characteristics: 2000, Census 2000 Summary* ***File*** *I (SF 1) 100-Percent Data. Houma, LA Urbanized Area.*

33 Petition at 11.

34 See Exhibit J.

35 Petition, pp. 12-14 and Exhibit B. Jambalaya is an Acadian dish composed of rice, condiments, seafood and/or meat.

The Houma Courier, which is owned by the New York Times." Gonzales has a weekly paper. the Gonzales Weekly, with a weekly circulation of only 8,000.[37]

15. The anomalous nature of Clear Channel's proposal is even more obvious when one realizes that KSTE-FM is one of only two FM stations licensed to serve Houma (or any other community in Terrebonne Parish, the second largest parish (county) in Louisiana), and one of only three stations total.[38] While KSTE-FM would be the first "local" transmission service licensed to serve Gonzales, the fact is that Gonzales receives numerous FM and AM reception services from Baton Rouge, New Orleans and other communities – far more than the Houma area or southern Ten-ebonne Parish receive.[39]

16. The most bizarre aspect of the proposal is that Clear Channel could relocate the KSTE-FM transmitter from its present site to the allotment site proposed in the Petition while still providing a 70 dBu signal well beyond Houma! In other words, Clear Channel did not need to propose to reallot KSTE-FM from Houma to Gonzales in order to accommodate the move of WUSW-FM from Hattiesburg to the New Orleans area. It could have done the same simply by filing a one-step minor change application to move the KSTE-FM transmitter site and downgrade the station from Class C to Class C0. Then it could have filed a much simpler rulemaking request to reallocate WUSW-FM from Hattiesburg to the New Orleans area.

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36 Daily circulation of the Houma Courier is 19,471, and Sunday circulation is 21,350. *Gale Directory of Publications and Broadcast Media,* 136th edition.

37 *Gale Directory of Publications and Broadcast Media,* 136th edition.

38 The three stations licensed to Houma are KSTE-FM, KCIL-FM, and KFXY(AM) (1490 kHz, 1 kW-U.

39 See Petition, Technical Exhibit at Figure 8. The location of Gonzales and Houma are indicated at Petition, Technical Exhibit at Figure I0. According to the Petition, Exhibit B, **"http:Nwww.gonzalesla.codabout.htm,"** there are 13 radio stations serving Gonzales.

17. In order to understand the Gonzales portion of the *NPRM*, it is necessary to conduct independent research as to each aspect of Clear Channel's proposal. **As** in the case of the Westwego *Huntington/Tuck* analysis, it is simply not possible to rely on the assertions contained in the Petition. To the extent that the *NPRM* was issued in good faith reliance on the representations set forth in the Petition, then its reliance is misplaced. The Petition is replete with numerous instances of misleading assertions by the proponent. As shown, ***supra,*** the Petition's characterization of Westwego as a distinct and independent community, not an interdependent part of the New Orleans Urbanized area, surely would cause a resident of the area to snicker, at a minimum. More importantly, however, as will be shown below, there were **a** number of serious and materially false statements underlying Clear Channel's arguments.

18. The same is true for the portion of the Petition supporting the proposed move of the second Houma FM channel, occupied by KSTE-FM, to Gonzales. These misrepresentations are particularly egregious. When the true facts are understood, the Clear Channel's reason for proposing to move its Houma station to Gonzales becomes apparent.

19. Clear Channel claims that Gonzales is outside all Urbanized Areas.[40]. The Petition also claims that the reallocated and downgraded KSTE-FM will encompass only two percent of the Baton Rouge Urbanized Area.[41] Clear Channel submitted a map as part of its Petition that shows that Gonzales is more than 20 kilometers from the nearest part of the Baton Rouge Urbanized area, and that the proposed KSTE-FM signal will cover only a fraction of the Urbanized Area.[42] **These claims and graphics are all blatantly false!** The Clear Channel

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40 Petition, at 11.

41 Petition, Technical Exhibit, at 6.

42 Petition, Technical Exhibit, Figure 10

Petition is based on graphic and material falsehood.[43] **The developed area of Gonzales is in fact part of the Baton Rouge Urbanized Area!**[44] The Urbanized area runs continuously from Sorrento, which is southeast of Gonzales, through the city of Baton Rouge, to encompass Baker, Louisiana north of Baton Rouge. Moreover, Ascension Parish, in which Gonzales is located, is also entirely within the Baton Rouge Arbitron Metro.[45] These false statements undercut the very basis of the *NPRM*, and require its immediate dismissal.

20. Now the reason for the Clear Channel proposal is crystal clear. It is really a hidden and *de facto* reallotment of the channel from Houma to the Baton Rouge Urbanized Area, population 479,019. Moreover, it appears that the reference site used by Clear Channel was carefully chosen to minimize service to the Baton Rouge Urbanized Area **for purposes of this rulemaking proceeding only.** In fact, even if the proposed Westwego reallotment is made at the reference coordinates, it is possible to locate a transmitter significantly closer to Baton Rouge, thereby improving coverage. Attached as Exhibit K is an engineering study showing the area in which the transmitter could be relocated, as well as a map showing the amount of service that could be provided to the Urbanized Area from the point in the open zone nearest to Baton Rouge. Moreover, if Clear Channel were to actually locate a Westwego station east of the reference coordinates, even more area would open up as available for an even closer transmitter site. In addition, one of the constraining factors is an allocation of Channel 282C2 at Bunkie, which clears Clear Channel's specified reference transmitter site by only .78 kilometer.[46] Station KEZP, Bunkie, has a pending application to upgrade its station KEZP from Channel 282C3 to

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43 A picture may be worth a thousand words, but a false image is worthless.

44 U.S. Department of Commerce, Economics and Statistics Administration, U. S. Census Bureau, Urbanized Area Outline Map (Census 2000), Baton Rouge, LA.

45 See Exhibit J.

46 Petition, Technical Exhibit, Figure 2.

Channel 282C2, using that allotment. The site specified in the KEZP application clears the Gonzales transmitter site area by 23.66 kilometers.[47] Thus, in the near future it appears that one of the protective spacings which limit the ability of a Channel 281C0 station to be relocated to the northwest towards Baton Rouge will be removed. Such potential impacts cannot be ignored by the Commission.

21. The reason why Clear Channel would want to be in the Baton Rouge Urbanized area is obvious: it is several times the size of the Houma Urbanized Area: population 479,019, versus 125,929 in the Houma Urbanized Area. The potential advertising revenue also greatly favors a station serving the Baton Rouge area, rather than Houma. For example, the circulation of the Baton Rouge Daily Advocate is 96,239, versus 19,471 (21,350 on Sunday) for the Houma Courier.[48] Baton Rouge is a top-100 Arbitron radio market;[49] Houma is outside all rated markets. Metro Number 83, and ranks 73rd in revenue. Most importantly, Clear Channel already has a very strong competitive position in the Baton Rouge radio market, with two Class C FM stations WYNK-FM and WFMF), one Class C2 station (KRVE), and three AM stations with 5 kW or greater power (WJBO, WSKR and WYNK). Again, through this proposal Clear Channel seeks to avoid scrutiny of the media concentration that would otherwise face its attempt to acquire an additional outlet in the Baton Rouge market.

22. Based on its claim that Gonzales is outside all Urbanized Areas, Clear Channel has declined to provide a *Huntington* or a *Tuck* analysis with respect to that proposed community of license. Because Gonzales is within the Baton Rouge Urbanized Area, the Commission may

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47 ***Id.***

48 *Gale Directory of Publications and Broadcast Media*, 136th edition.

49 Baton Rouge is the 74th ranked radio advertising market by revenue, and is the 83rd largest Metro by population. BIA Financial Network, *Investing in Radio 2002, 3rd Edition.*

not act upon the pending rulemaking proposal without requiring the submission of such a showing, as well as giving the public, including Guaranty, the opportunity to comment on and to rebut such a showing." See *Kankukee and Park Forest, Illinois, supra*. This is not changed by the fact that a lightly-populated portion of Gonzales is outside the Baton Rouge Urbanized Area, or that a station at the proposed reference point would not serve all of the Baton Rouge Urbanized Area. See *Malvern and Bryant, Arkansas*, 14 FCC Rcd 3576 (1996) *(Tuck* showing required when the proposed community was only partly within an Urbanized Area and a station would serve less than 1 percent of the Urbanized Area). Without a *Tuck* showing, the proposed reallotment cannot be granted.

**Alternative Proposal**

23. Guaranty's opposition to the reallotment of Channel 281 from Houma to Gonzales is based both on its concerns that the Section 307(b) criteria are being "gamed" to shift service from deserving smaller communities to larger urban areas, and its belief that a community as large and vital as Houma deserves competitive service from two FM stations. It does not oppose providing either Westwego or Gonzales with a local station, so long as such allotments are not simply subterfuges for "move-ins'' to New Orleans and Baton Rouge. Therefore, Guaranty proposes, as an alternative to the proposed reallotment and downgrade of Channel 281C from Houma to Channel 281C0 at Gonzales the following:

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50 Because Clear Channel has not made **a** *Tuck* showing, Guaranty will not attempt to rebut the *Tuck* factors in advance. Suffice it to say that there is substantial evidence on each of the *Tuck* factors which demonstrate its ties to, and interdependence with, the Baton Rouge Urbanized Area. Guaranty will submit such evidence at the appropriate time.

| City | Channel Existing | Channel Proposed |
|---|---|---|
| Baton Rouge, Louisiana | 251C, 264C1 268C, 273C, | 251C,268C, 273C |
| Gonzales, Louisiana | ---- | 264C1 |

No changes would be made at Houma.

24. This proposal will offer significant advantages to that proposed by Clear Channel. It will permit a first local service to be provided to Gonzales. No Section 307(b) preference is involved, as it involves the move of Station WTGE(FM) from Baton Rouge to Gonzales. WTGE is licensed to Guaranty Broadcasting Company of Baton Rouge, LLC ("Guaranty Baton Rouge") a controlled affiliate of Guaranty, and which joins in this allocation request. Because both communities are components of the Baton Rouge Urbanized Area, no concerns regarding manipulation of Section 307(b) priorities are present." Station WTGE provides a 70 dBu signal to all of Gonzales. Baton Rouge is well served with radio service. In addition to the three allocated FM channels, there are four noncommercial FM stations[52] and seven AM stations[53] licensed to serve Baton Rouge. If this proposal is adopted, Guaranty Baton Rouge will promptly

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51 This proposal need not interfere with the reallotment of Channel 279C0 to Westwego should the Commission conclude that such a reallotment would serve the public interest. As discussed above, the transmitter site of KSTE-FM can be located at a point that will permit the Westwego reallotment while still providing the required 70 dBU signal to all of Houma. The Commission may adopt an appropriate site restriction for KSTE-FM should it decide to proceed with a Westwego allotment. The decision will rest with Clear Channel.

52 According to the Commission's CDBS system, these operate on Channels 203C3, 207C1, 212C3 and 216A.

53 According to CDBS, the following AM stations are licensed to Baton Rouge: WRBH, WIBR, WJBO, WNDC, WPFC, WXOK and WYNK.

take such steps as **are** required to change the city of license of WTGE from Baton Rouge to Gonzales.

25. The proposal would eliminate the loss of service to 655,290 persons that results from the Clear Channel proposal to move KSTE-FM from Houma to Gonzales. Moreover, it would retain an important signal in a very low-lying area that is one of the most affected by recurrent tropical storm activity in the United States. In fact, at this time AM station KFXY, one of only two stations licensed to Houma, remains off the air due to flooding associated with two tropical storms that struck the Houma area in 2002. There is a great demand for the public safety information that a wide area station can provide to Houma and Terrebonne Parish, a need much greater than facing Gonzales.

26. It is unclear whether, under Commission precedent, this alternative proposal is "mutually exclusive" and thus may be considered a counterproposal in this proceeding. Because of this, Guaranty is filing a Petition for Rulemaking simultaneously herewith requesting the allotment changes discussed herein. Because of the important public interest questions raised, including avoiding withdrawal of one of only two FM channels from Houma and Terrebonne Parish, as well as the elimination of the substantial net population loss that would result from approval of the move of Channel 281C from Houma to Gonzales, a Public Notice should be issued consolidating such rulemaking with the instant proceeding and a decision issued which considers both alternatives.

## Conclusion

The Commission should deny Clear Channel's proposed reallotment of WUSW-FM from Hattiesburg, Mississippi, to Westwego, Louisiana and of KSTE-FM from Houma, Louisiana, to Gonzales, Louisiana. In no event can Clear Channel's Gonzales proposal be considered without

submission of a ***Tuck*** showing, and the opportunity of others to test the veracity of that showing. The Commission should consider Guaranty's alternative proposal which permits Gonzales to gain its first local service without affecting Houma or creating a bogus preference under Section 307(b).

Respectfully submitted,

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Dated: November 18,2002