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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D C 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
	)	
Amendment of Section 73 202(b)	)	MM Docket No 99-322
Table of Allotments	)	RM-9762
FM Broadcast Stations	)	
(Chillicothe and Ashville, Ohio)	)	

TO The Commission

APPLICATION FOR REVIEW

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SUMMARY

This case involves a proposed FM channel reallotment which would result in an ownership situation which would violate the new radio ownership rules adopted by the Commission in *Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620 (2003). The Media Bureau, alerted to that violation, chose simply to ignore it, asserting that (a) the Joint Petitioners could and should raise the matter when the reallotment proponent files an application to effectuate the reallotment, and (b) the new ownership rules are immaterial because they have been stayed by the Court of Appeals

But the Bureau's first claim - that objections should be raised at the application stage – was illogical because the reallotment occurs ***not*** at the application stage, but as a result of the rule making process By the time the application is filed, the damage has been done

And the Bureau's second claim – that the new ownership rules need not be considered because they have been stayed – is flatly inconsistent with Commission policy clearly and unequivocally expressed in *Shareholders of Hispanic Broadcasting Corporation*, FCC 03-218, released September 22, 2003

The Bureau's decision, and its underlying reliance on the *Tuck* analysis, clearly fly in the face of the new ownership rules In particular, *Tuck* is based on an approach to radio markets which the Commission has expressly abandoned in the new rules

And reliance on the *Tuck* analysis is in any event arbitrary and capricious because that analysis is based entirely on the notion that allotment of a channel to a particular community will lead to "local service" to that community from the station which is authorized to operate on that channel But the notion of "local service" in this context is a regulatory mirage, a non-functional

vestige of a different regulatory regimen abandoned by the Commission over the last two decades No basis exists from which to presume that "local service" will automatically occur, and the Commission has no regulatory means of determining whether such "local service" is being provided the Commission's rules neither define nor require any such "local service", and even if the rules did include some such definition and/or requirement, the Commission's rules impose on licensees no record-keeping obligations which would enable the Commission to determine whether (and if so, how much) "local service" any station might be providing

Because of these considerations, any reliance on the *Tuck* analysis is arbitrary, capricious and unlawful

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Pursuant to Section 1.115 of the Commission's Rules, Franklin Communications, Inc., North American Broadcasting Co., and WCLT Radio Incorporated (collectively, the "Joint Petitioners"), hereby seek review by the Commission of the decisions of the Assistant Chief, Audio Division, Media Bureau ("the Bureau"), in the above-captioned proceeding. Those decisions are set out in *Report and Order ("R&O")*, 17 FCC Rcd 20418 (Med. Bur. 2002), *recon. denied, Memorandum Opinion and Order ("MO&O")*, DA 03-3443, released October 31, 2003.[1] As set forth below, the Bureau's reallotment of Channel 227B from Chillicothe to Ashville, Ohio, is in conflict with established rules and policies of the Commission and also involves questions of law and policy which have not previously been resolved by the Commission.

QUESTIONS PRESENTED FOR REVIEW

Did not the FM channel allotment decision below violate the letter, the rationale and the spirit of the limits on local radio ownership established by the Commission in *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996* ("*Ownership Report and Order*"), 18 FCC Rcd 13620 (2003)?

Was it not arbitrary and capricious for the Bureau to make the FM channel allotment decision below based on a presumption that the allotment will result in "first local service" when (a) that presumption runs counter to established Commission policy, and (b) the Commission has ***never*** tested, and is in any event ***unable*** to test (much less to confirm), the validity of that presumption?

[1] A summary of the *MO&O* was published in the Federal Register on November 14, 2003. *See* 68 Fed Reg. 64555 (November 14, 2003). Accordingly, this Application for Review is timely. *See* Sections 1.115(d) and 1.4(b) of the Commission's Rules. The Joint Petitioners have participated in this proceeding since its inception.

ARGUMENT

I. Background

1 This proceeding involves an effort to move a Class B FM channel (Channel 227B) from Chillicothe, Ohio, to Columbus, Ohio Since Columbus is already a very well-served market, it is extremely doubtful that the Commission would have given any serious consideration to a proposal to reallot the channel to Columbus In a transparent effort to get around that concern, the proponent here specified Ashville, Ohio, as the proposed community of reallotment.

2 Chillicothe, approximately 43 miles distant from Columbus, has a population of approximately 22,000 Ashville, located between Chillicothe and Columbus (approximately 26 miles north-northeast of Chillicothe, approximately 17 miles south of Columbus) has a population of approximately 3,174 So the proposal would move a powerful Class B channel from a community with 22,000 people to a community with 3,174 people – a curious choice perhaps, until you recognize that, as a result of the reallotment, the station can be nestled into the heart of the Columbus Urbanized Area, with its population of 1,133,193 The Joint Petitioners repeatedly pointed out to the Commission that Ashville would be, at most, only a pitstop on the way to Columbus by using Ashville as the community of license, the proponent would be able to locate its transmitter in such a way as to enable the station to be effectively a Columbus station.

3 In response, the proponent did not deny any intention to become a Columbus station, but instead argued that, contrary to the "purely speculative" claims of the Joint Petitioners relative to possible relocation of the station, the proponent was ***not*** proposing any change in the authorized transmitter site of Station WFCB(FM) *E g* , "Supplement to Comments Filed In Support of Notice of Proposed Rule Making", submitted June 14, 2002 at 2 The station's

authorized site was between Chillicothe and Ashville, approximately 12 miles from Ashville and more than 26 miles from Columbus The clear implication of the proponent's claim was that the proponent intended to remain an Ashville station, keeping its transmitter to the south and west of Ashville, away from Columbus's looming presence north of Ashville

4 The claim that no site change was on the table was also essential to the proponent's chances because Station WFCB is a pre-1964 grandfathered short-spaced station. *See R&O* at 2, ¶3

5 The Bureau approved the reallotment in the *R&O* in October, 2002. The Joint Petitioners sought reconsideration, again arguing that the proposed move to Ashville was merely a pitstop on the way to Columbus, and again pointing out that, if the channel were to be allotted to Ashville, a transmitter site modification could place the channel in downtown Columbus The proponent, of course, again demurred, intoning its by-now familiar mantra that the Joint Petitioners' concerns about possible transmitter site location were "purely speculative" See "Opposition to Petition for Reconsideration", submitted December 19, 2002, at 2

6 In response, the Bureau staff issued a Request for Supplemental Information ("*RSI*"), DA 03-1842, released June 2, 2003 In the *RSI* the staff acknowledged that the proposed reallotment, combined with a transmitter site change, could enable the station to serve most, if not all, of the Columbus Urbanized Area Accordingly, the staff sought *Tuck* showings from the parties *See Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988) The stated purpose of that request was to allow a demonstration that "Ashville is independent of the Columbus Urbanized Area and therefore entitled to consideration as a first local service".

7 The proponent and the Joint Petitioners responded to the *RSI*. While the Joint Petitioners offered a *Tuck* analysis demonstrating that Ashville cannot be deemed independent of

the Columbus Urbanized Area, the Joint Petitioners also argued that Ashville's independence *vel non* is immaterial for several reasons First, under the ownership rules adopted by the Commission in June, 2003, the proposed reallotment would put the proponent in violation of the Commission's local ownership limits. Second, the Commission has announced a new recognition of the manner in which radio stations operate in the marketplace, a new recognition which essentially echoes what the Joint Petitioners have been saying all along: the reality of the situation is that, if the channel is moved to Ashville, the station will operate as a Columbus station, serving the Columbus market

8 And third, the Joint Petitioners argued that, in any event, continued reliance on the *Tuck* analysis is arbitrary and capricious The core assumption underlying the *Tuck* approach is that allotment of a channel to a particular community will inevitably lead to "local service" to that community The provision of such "local service" directed to the community of allotment is the ultimate justification for a reallotment adopted pursuant to the *Tuck* test But the Commission has never defined what such "local service" consists of and, more importantly, the Commission has no ability (and has shown no inclination) to monitor the nature and extent of any licensee's "local service" to determine whether such service is being provided

9 In the *MO&O* the Bureau concluded that Ashville is independent of Columbus. And while the proposed allotment would result in a clear violation of the recently-adopted local radio ownership rules, the Bureau ignored the impact of those recent changes in its local ownership regulation, claiming that (a) compliance with ownership limits should be considered only in application proceedings, not reallotment proceedings and (b) the effectiveness of the new ownership rules has been stayed, so those rules need not be considered The Bureau failed to address in any way the facts that the Commission does not impose any regulatory requirement

relative to "local service", nor has the Commission defined such service, nor does the Commission currently have the ability to monitor station operations to determine whether (and if so, to what extent) such "local service", however defined, is being provided

10 Less than two weeks after the release of the *MO&O*, as if to prove the validity of the Joint Petitioners' repeated concerns that the goal of this process has been to move the station into Columbus, the proponent filed a modification application proposing to relocate the station's antenna to a site closer to the Columbus than to Ashville

II. The Bureau below refused to act in a manner consonant with the Commission's new ownership rules, contrary to express Commission policy.

11 The following premises are undisputed: (a) Ashville is located in Pickaway County, which is within the Columbus Arbitron Metro, as reflected in the BIA Media Access Pro database, (b) a total of 43 full-service radio stations (not including Station WFCB(FM)) are included in that Arbitron Metro, (c) the BIA database attributes a total of seven of those 43 stations to Clear Channel Communications ("Clear Channel"), the current licensee of Station WFCB(FM) and the current proponent of the reallotment; (d) in the *Ownership R&O*, the Commission imposed a cap of seven radio stations in a market with between 30-44 commercial or noncommercial full-service radio stations. *See* Joint Petitioners' Comments in Response to the *RSI* at 2

12 Thus, the reallotment of Station WFCB(FM) to Ashville would move it into the Columbus Arbitron Metro and would push Clear Channel into violation of the new ownership limits by giving it a total of eight radio stations in a market which is subject to a cap of seven For this reason the Joint Petitioners argued that the proposed reallotment must be summarily dismissed

13 In the *MO&O* the Bureau rejected that argument According to the Bureau, issues of compliance with multiple ownership limits are, as a matter of Bureau policy, considered "in conjunction with the application to implement the reallotment", and (according to the Bureau) the Commission has not instructed the Bureau to alter that policy *MO&O* at 5, ¶11 The *MO&O* also asserts that the effectiveness of the new ownership rules has been stayed, and that the Bureau will not defer processing of allotment proposals "in order to implement ownership rules not in effect" *Id*

14 The Bureau's first line of defense – *i e* , that Bureau policy provides for consideration of multiple ownership compliance at the application stage, rather than the allotment stage – makes no sense in view of the fact that the violation of the multiple ownership rules arises when the allotment decision places the occupied channel (and, therefore, the station which occupies that channel) in Ashville Once that reallotment occurs, the channel has been moved into the Columbus Arbitron Metro and the station operating on that channel must be deemed to be in that Metro, whether or not a follow-up application is filed. As the Bureau has previously held, if an application is not filed, the channel does ***not*** automatically revert to the former community *See Amendment of Section 73 202(b) (Milledgeville, Georgia),* 10 FCC Rcd 7727, ¶2 (Policy and Rules Division 1995) ("[T]he Commission's Rules do not provide for the automatic [reversal] of an allotment when a licensee or permittee fails to file a minor change application to implement [the reallotment]")

15. The Bureau's "policy" is especially silly in view of the fact that, in approving a reallotment (such as the Chillicothe-to-Ashville proposal here), the Bureau ***orders*** the proponent to file an application to specify the modified allotment and does ***not*** condition the effectiveness of the reallotment on the grantability of that application So by the time the application rolls in

the door, the reallotment is a *fait accompli* and the proponent is compelled, by the Bureau, to seek to modify its authorization to conform that authorization to the reallotment It is frivolous for the Bureau to suggest that consideration of important questions of compliance with multiple ownership limits can or should be withheld until the application stage, particularly when, as here, the facts are undisputed and the impermissibility of the post-reallotment ownership is clear The Bureau's supposed "policy" of deferring consideration of compliance questions to the application stage is conceptually at odds with the proper operation of the Commission's rules

16 As far as the Joint Petitioners have been able to determine, this Bureau policy has never been reviewed or approved by the Commission Review and reversal of this policy are clearly warranted here

17 The Bureau's second line of defense – *i e* . that the staff may ignore the new ownership rules because their effectiveness has been stayed – is even more flawed, as it flatly contravenes stated Commission policy

18 While it is true that the Court of Appeals stayed the effectiveness of the new rules, that stay did not vacate, rescind, annul or otherwise alter the substantive validity of the new rules or the Commission's rationale therefor [2] Indeed, notwithstanding the stay, the Commission has made crystal-clear that it continues to believe in the validity of its analysis underlying the new rules and remains firmly committed to assure compliance with those new rules when and if the stay is lifted

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[2] Indeed, in granting the stay, the Court of Appeals observed merely that "it is difficult to predict the likelihood of success on the merits at this stage of the proceedings" *See* Order filed September 3, 2003 in *Prometheus Radio Project v FCC*, No 03-3388 (3rd Cir), at 3 That is, the Court did not suggest that, in granting the stay, the Court had determined that there was a likelihood that the challenge to the new rules would be successful

19 In *Shareholders of Hispanic Broadcasting Corporation*, FCC 03-218, released September 22, 2003, the Commission addressed a proposed transaction which, while satisfying the old ownership rules, clearly violated the new rules which are subject to the court-imposed stay. The Commission approved the transaction, but subject to the condition that the non-compliant aspects of the transaction must be brought into compliance within six months after the stay is lifted. According to the Commission,

> [h]aving found the previous methodology for defining radio markets not to be in the public interest, ***we believe it would not be in the public interest to grant an application that would not comply with the radio multiple ownership rule once the new methodology is applied***. Absent the ability to condition upon compliance with our new rules, we would exercise our discretion not to act on the applications until the new rules become effective.

Shareholders of Hispanic Broadcasting Corporation supra at 6-7, ¶11 (emphasis added).

20 That case is markedly similar to the instant matter: the Commission here is presented with a proposal which would violate the new rules, if those rules were not subject to a judicial stay. In *Shareholders*, the full Commission made clear that the stay did not alter its view that the old radio ownership rule was not in the public interest, and the Commission took appropriate action to assure that, upon the lifting of the stay, the action it was taking would be brought into compliance with the new rules. In the instant case, the Bureau took precisely the opposite approach. Ignoring the new rules and the rationale therefor, the Bureau has treated the rules and their rationale as if they do not now and never will exist – when in fact both the rules and the rationale are undeniably in existence and are expected to be effective, as the Commission has explicitly stated.

21 Since the Bureau's blithe disregard for the new rules is flatly contrary to the Commission's clearly-stated continuing endorsement of and commitment to those rules, the Bureau's decision below should be reviewed and reversed.

III. The Bureau's reliance on *Tuck* was inconsistent with the Commission's new ownership rules.

22 For similar reasons, the Bureau's decisional reliance on the *Tuck* analysis smashes head-on into Commission's re-vamped approach to radio markets announced in the *Ownership R&O*. There the Commission held that, with respect to radio, it will assess multiple ownership in the context of markets as defined by Arbitron, *Ownership R&O* at ¶¶275-281. The Commission's decision on that point demonstrates the agency's common sense recognition of the real world operation of competing radio stations. As the Commission observed,

> Arbitron's market definitions are an industry standard and represent a reasonable geographic market delineation within which radio stations compete. Indeed, the DOJ consistently has treated Arbitron Metros as the relevant geographic market for antitrust purposes. As NABOB succinctly states, "Radio stations compete in Arbitron markets."

Ownership R&O at ¶276 (footnotes omitted). According to the Commission, Arbitron-defined markets "reflect more accurately the competitive reality recognized by the radio broadcasting industry." *Ownership R&O* at ¶280.

23 The *Ownership R&O* thus effects a significant change in the Commission's approach to radio markets. No longer will the Commission analyze each station based on the particular reach of that station's particular signal, as was the Commission's past contour-based practice of market analysis. Now, instead, the Commission has concluded that a station licensed to a community in an Arbitron-defined market will be considered to be serving and competing in that market, without regard to the niceties of that station's facilities and operations.

24 According to Arbitron, the Columbus, Ohio market includes Franklin County, in which Columbus is located, as well as, *inter alia*, Pickaway County, in which Ashville is located. Thus, Ashville is in the Arbitron-defined Columbus market and must be deemed a part of that

market And stations within that market are deemed "likely to serve the larger out-lying metropolitan areas that also comprise Arbitron Metros" *Ownership R&O* at ¶280 The *Ownership R&O* thus renders the *Tuck* analysis inconsequential That is particularly true here, where Channel 227 – a full Class B channel [3] - is proposed to be moved ***out of*** Chillicothe, which is ***not*** in the Arbitron-defined Columbus market, ***and into*** Ashville, which ***is*** in that market If the Commission intends to continue to utilize the now-apparently-superseded *Tuck* analysis, the Commission will have to explain how it can purport to do so consistently with the *Ownership R&O* and the policies underlying that decision.

25 While the Joint Petitioners raised this argument below, the Bureau declined to address it because the Bureau thought that the stay of the new ownership rules essentially read the new rules out of existence *See MO&O* at 5, ¶11. As discussed above, however, that position is at odds with the Commission's commitment to the new rules and its corresponding commitment to the determination that its previous approach to radio ownership assessment was ***not*** in the public interest *See Shareholders of Hispanic Broadcasting Corporation, supra* Since the Bureau's decision below ignores the regulatory theory underlying the new rules and instead applies a theory inextricably bound up with the since-rejected old rules, that decision must be reviewed and reversed.

[3] It seems odd that the Commission would consider use of Channel 227B, a relatively higher-powered channel, at Ashville, whose population is approximately one-fifth that of Chillicothe, to be a better, more efficient use of the channel

IV. The Bureau's reliance on the *Tuck* analysis and the decisional weight awarded by that analysis to the notion of "local service", is arbitrary and capricious because the essential prediction of "local service" is completely unsupported and unsupportable.

26 And even if *Tuck* were deemed to retain some, any, vitality in the wake of the *Ownership R&O*, the *Tuck* analysis is in any event fatally flawed The central notion underlying *Tuck* is that a station licensed to a particular community may be expected to provide "local service" to that community The problem, however, is that the notion of "local service" in this context is a regulatory mirage, a non-functional vestige of a different regulatory regimen abandoned by the Commission over the last two decades.

27 To be sure, the Commission continues to assert, as it has for decades, that "we require radio stations to serve their communities of license", *Ownership R&O* at ¶280 And many, many radio stations no doubt provide very substantial local service to their respective communities of license But such performance occurs more likely as a result of the licensees' private sense of public responsibility than as a result of any Commission "requirement" because the Commission's rules provide no indication at all about what any such "requirement" might entail, or how licensees might satisfy that "requirement" More importantly, the Commission has absolutely no ability, and has shown no inclination, to monitor the nature and extent of any licensee's "local service" to determine whether that supposed "requirement" is being satisfied.

28 From the earliest days of broadcasting the Commission has licensed broadcast stations to particular communities pursuant to Section 307(b) And for years the Commission ***did*** impose a number of specific regulatory obligations through which it sought to assure that stations would in fact provide local service to their respective communities of license. These included requirements that

- each broadcast licensee undertake extensive, formalized efforts to apprise themselves of the needs and interests of the community and to establish lines of direct communication between those community representatives and the station, *e g , Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC2d 650 (1971) ("*Ascertainment Primer*"), *Ascertainment of Community Problems by Broadcast Applicants*, 57 FCC2d 418, *recon granted in part*, 61 FCC2d 1 (1976) ("*Renewal Primer*"),

- each broadcast licensee maintain detailed logs (representative samples of which were submitted to the Commission for its review with the station's renewal application) which delineated, *inter alia*, the station's local programming, *e g , Reregulation of Radio and TV Broadcasting*, 69 FCC2d 979, 1002-1008 (1978), *Office of Communication of the United Church of Christ v FCC*, 707 F 2d 1413, 1422 (D C. Cir. 1983) ("*UCC I*"), while the processing of license renewal applications included consideration of the amount of local programming reflected in the application, *e g , Amendment of Section 0 281 of the Commission's Rules*, 59 FCC2d 491 (1976), *Intercontinental Radio, Inc* , 98 FCC2d 608, 620-623 (Rev. Bd. 1984) (assessment of renewal applicant's program performance includes references to "local" source of programming);

- each broadcast licensee maintain a main studio in the community of license, from which a majority of the station's programming had to originate, *e g , Main Studio Location*, 27 FCC2d 851 (1971) ("*Main Studio I*"), *Reiteration of Policy Regarding Enforcement of Main Studio Rule*, 55 Rad Reg 2d (P&F) 1178 (1984), *Main Studio and Program Origination Rules for Radio and Television Stations*, 2 FCC Rcd 3215, 3218 (¶38) (1987) ("*Main Studio II*"),

- each broadcast licensee maintain, at its main studio (or elsewhere in its community of license), a local public inspection file containing information about the station's operations, which file would be available to the public during regular business hours, *e g ,* 47 C.F.R §73 3526, *UCC I*, 707 F 2d at 1438-1442, *Main Studio II,* 2 FCC Rcd at 3218 (¶38)

While these rules, and the close interaction between station and public which they sought to encourage, might arguably have afforded the Commission some means, albeit indirect [4], of assuring "local service", over the past 20 years each of these requirements has been either eliminated or diluted to the point of total ineffectiveness

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[4] The indirectness of the Commission's approach is no doubt attributable to the Commission's understandable reluctance, borne of First Amendment considerations, to engage in direct regulation of program content

29. The ascertainment process requiring applicants and licensees to establish on-going contacts with community representatives was eliminated in 1981 as part of the deregulation of radio *Deregulation of Radio,* 84 FCC2d 968, 993-999 (¶¶55-72) (1981) *recon granted in part*, 87 FCC2d 796 (1981), *aff'd in relevant part, UCC I*, 707 F 2d at 1435 While the Commission continues to expect, in the vaguest of terms, that licensees will somehow familiarize themselves with their communities of license, *Deregulation of Radio,* 84 FCC2d at 998, 87 FCC2d at 822-823, such familiarity may be gained by virtually any means Indeed, there is ***no*** requirement that licensees even set foot in those communities The FCC's abandonment of ascertainment, and the purely vestigial form of that requirement which remains in place today, cannot be said to give the Commission any confidence that any station is in fact providing "local service" To the contrary, the regulatory trend has been in precisely the opposite direction

30 While the rules once required detailed logging of "local" programming and detailed analysis of those program logs in each station's renewal application, *see, e g*, *Reregulation of Radio and TV Broadcasting,* 69 FCC2d at 1002-1008 (setting out complete text of program logging rules then in effect), *Intercontinental Radio, Inc , supra*, those rules have been abandoned as well *E g , Deregulation of Radio,* 84 FCC2d at 1008-1010 The Court twice expressed concern about this drastic step, *see UCC I,* 707 F 2d at 1438-1442; *Office of Communication of the United Church of Christ v FCC*, 779 F 2d 702, 707-714 (D C Cir. 1985) ("*UCC II*"), but the Commission declined to re-impose logging requirements

31 Moreover, as part of the deregulation of television, the Commission eliminated any consideration of the precise amount of local programming broadcast during the preceding license term *Revision of Programming and Commercialization Policies, Ascertainment*

Requirements, and Program Log Requirements for Commercial Television Stations, 98 FCC2d 1076 (1984) This further attenuated the Commission's ability to monitor actual performance It also further attenuated the notion that any particular level of "local" performance might be expected of licensees – if, after all, they were not required to keep track of such performance, much less provide any reports of such performance to the Commission, and if such performance was no longer a factor to be considered in the routine license renewal process, how could licensees be expected to understand that there might be any continued regulatory significance to such performance?

32 The main studio rule, which mandated that each station have a physical presence in its community of license, has been weakened to the point that it provides no assurance that a station will have any physical connection at all to its community of license *Any* station may locate its main studio as much as 25 miles away from its community of license, *see* 47 C F R §73 1125(a)(3), and some stations are permitted to locate their studios as much as 80 miles or more from their community of license [5] And the program origination rule, which with the main studio rule constituted the core element of the regulatory effort to assure local service [6], was eliminated in 1987 *Main Studio II*, 2 FCC Rcd at 3218-3219 Licensees have not

[5] *See* Joint Petitioners' Comments in Response to the *RSI* at 16-19 for a detailed discussion of the regulatory history of the main studio and program origination rules To appreciate the lassitude of the current main studio requirements, the Commission should consider that, under the 25-mile rule (*i e*, Section 73 1125(a)(3)), stations licensed to Crofton, Maryland, or Reston, Virginia could lawfully set up their main studios in the Commission's lobby in Washington, since those communities are within 25 miles of Washington And to provide some idea of the remoteness of 80 miles' distance, the following communities are well within 80 miles of the Commission Front Royal, Virginia. Culpeper, Virginia, Hagerstown, Maryland. Cambridge, Maryland Easton, Maryland How "local" would it be for a station licensed to, say, Hagerstown, to have its main studio next door to the Commission's offices?

[6] Addressing program origination rules for AM and FM stations in 1950, the Commission observed that

> [I]t is apparent that §307(b) and the Commission's efforts to apply it may be largely frustrated if, after a station is licensed for the purpose of providing both reception and transmission service to a

Footnote continued on next page

been required to originate ***any*** particular amount of programming from their respective communities of license for more than 15 years

33 The public file rule, 47 C F R §73 3526, while still in effect, has been diluted along with the main studio rule – since the public file rule now mandates that the station's public file be maintained at the station's main studio Because of that requirement, and because of the freedom to locate main studios at considerable distance from the community of license, the local public inspection file may also be placed at such distance from the community of license

34 Thus, there is no regulatory basis which might support the presumption that a station licensed to a community will necessarily serve that community. To the contrary, the trend of Commission decisions in this area has been directly counter to that presumption In view of the clear and unmistakable regulatory direction ***away from*** any required physical or programming-based connection between a station and its community of license, the fanciful notion at the core of the *Tuck – i e* , that a station is subject to some discernible "local service" obligation, compliance with which might be monitored and enforced – runs plainly against the grain of the development of Commission policy over the last 20 years

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(Footnote continued for preceding page)

> particular community, it removes its main studio to a distant point and originates all or substantially all of its programs in a city or town other than that which it was licensed to serve Such action on the part of the station may substantially cut away the basis of the Commission's decision authorizing the establishment of the station

Promulgation of Rules and Regulations Concerning the Origination Point of Programs of Standard and FM Broadcast Stations, 43 FCC 570, 571 (1950) ("Origination Point of Programs") *See also, e g . Main Studio I*, 27 FCC2d at 803 (1971) (stating that maintenance of a main studio in a station's community of license is "one of the essential ways [of] insuring that stations realistically meet their obligation to serve their communities of licenses as outlets for local self-expression"), *Reiteration of Policy Regarding Enforcement of Main Studio Rule*, 55 Rad Reg 2d (P&F) 1178 (1984)

35 A similar trend is evident in statutory developments arguably relating to the notion of "community of license" The Communications Act itself imposes no specific obligations relative to a station's relationship to its community of license But the Act historically included two mechanisms – the comparative renewal process and the petition to deny process – which the Commission has viewed as providing incentives to assure that a licensee pays appropriate attention to its local audience

36 Under the comparative renewal process, incumbent renewal applicants were subject to challenge by competing applicants *See, e.g., Central Florida Enterprises, Inc v FCC, 683 F 2d 503 (D C Cir 1982), Monroe Communications Corporation v FCC*, 900 F 2d 351 (D C Cir. 1990). Again, this process did not itself mandate that licensees provide distinctly "local" service to their respective communities of license, but it did create an incentive for licensees to serve their local audiences The Commission cited that incentive in 1983 as a basis for abandoning a number of regulatory policies intended to discourage the reallotment of channels from smaller rural communities to already well-served communities in or adjacent to large metropolitan areas *See Suburban Policy, Berwick Policy and De Facto Reallocation Policy*, 93 FCC2d 436, 456 (1983), *see also Roberts Communications, Inc*, 11 FCC Rcd 1138, 1139 (1996) In other words, in 1983 the Commission observed that its own regulatory policies were an unnecessary belt in light of the fact that the comparative renewal policy served effectively as suspenders Accordingly, the Commission removed its belt

37. But since 1996 the suspenders have been gone, too. The comparative renewal process was statutorily eliminated in February, 1996 *See Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures)*, 11 FCC Rcd 6363 (1996) The defunct comparative renewal process no longer provides a

mechanism by which the Commission can hope to monitor or enforce any supposed "local service" requirement

38 The petition to deny process does remain in effect *See* 47 U S C §309(d) and (k) But there is no evidence at all that that process serves to cement the relationship between a station and its community of license or foster "local service" Indeed, undersigned counsel is unaware of any instance in more than 20 years in which the Commission has denied or designated for hearing a license renewal application based on a petition to deny alleging insufficient attention by the station to its community of license

39 And while the petition to deny process might afford a mechanism by which the Commission could conceivably afford petitioners the opportunity to complain to the Commission about a perceived lack of "local service", such complaints could not be rationally assessed and assayed by the Commission because, as discussed above, the Commission has ***not*** announced – either in any rule or in any policy statement or in any case-by-case adjudication – the metes and bounds of any "local service" requirement, nor has the Commission maintained any ability to assess empirically the "local service" of any licensee

40 The Commission thus finds itself in a position precisely analogous to its situation in the *Bechtel* case *See, e g , Bechtel v FCC*, 10 F 3d 875 (D C. Cir 1993) In *Bechtel*, the Commission had for years implemented a comparative licensing system which depended in large part on the supposedly predictive value of the "integration" analysis The conceptual validity of that analysis at the time of its initial implementation, in the 1940s, and even into the 1960s, may have been reasonable But by the late 1980s, regulatory changes adopted by the Commission over a period of years had undermined any seeming validity of the integration analysis, and the Commission was unable to provide any showing that that analysis in fact produced or was likely

to produce any of the salutary effects which it was intended to produce As a result, the Court held that the integration policy was arbitrary and capricious and ordered the Commission not to utilize that policy.

41 In the instant case we are presented with the Commission's "local service" policy – characterized as a "requirement" in the *Ownership R&O* (at ¶280) – which, although of completely indeterminate dimensions, supposedly justifies the relocation of a channel from Chillicothe, *i e*, outside the Columbus market, to Ashville, *i e*, inside the Columbus market. But the Commission has absolutely no way of knowing whether the channel, once reallotted to Ashville, will in fact provide "local service" to Ashville in any meaningful sense The Commission has not defined exactly how such "local service" might be identified, and even if it had, the Commission has, over the course of the last two decades, abandoned all of the regulatory devices by which it might have hoped to monitor and assess the provision of such "local service" Consistently with those considerations, the Commission has made no effort to confirm whether reallotments supposedly intended to result in such "local service" to a particular community have in fact resulted in such service [7]

42 Any reference by the Commission to "local service" in the context of a reallotment proceeding is thus nothing more than a superstitious incantation, a crossing of the

[7] An obvious, but certainly not the only, such situation is the reallotment of Channel 289A from Marysville to Hilliard, Ohio, effected in MM Docket No 98-123 In that case, Clear Channel, the current proponent of the Ashville reallotment, sought the reallotment from Marysville to Hilliard, initially proposing a transmitter site well north of Hilliard, which is in turn well north (and to the west) of Columbus But lo and behold, once the channel had been reallotted to Hilliard, Clear Channel applied to relocate the transmitter site of the newly-minted "Hilliard" channel to a site in the middle of downtown Columbus To the best of Joint Petitioners' knowledge, the Commission has made no effort since then to determine what, if any, of that station's programming is directed to Hilliard.

fingers, a wave of the magic wand – or any other ineffectual gesture intended to create the false impression that the agency might have some control over the outcome

43 The *Tuck* analysis accords overriding decisional importance to the perception that a community has a need for a "local service" and that such "local service" will perforce result from the requested allotment or re-allotment. But there is absolutely no regulatory basis for that latter conclusion At most, it is wishful thinking based on an historic regulatory regime long since abandoned by the Commission

44 Again, there is no current rule setting out the scope of any supposed "local service" obligation. [8]

45. And even if there were some currently enforceable regulatory basis, the Commission has absolutely no means by which it can, today, determine whether (and if so, the extent to which) any particular station may have complied or may be complying with that local service "requirement" [9] Not only are there no discernible standards by which such compliance might be gauged, but there are no underlying data which could be measured against such standards, nor are there are regulatory means in place (*e g* , program logs) from which such data might be gleaned, nor, to the best of our knowledge, has the Commission ever made any effort to determine empirically whether the crucial assumption underlying the *Tuck* analysis – *i e* , that

[8] Of course, if the Commission can cite to any rule setting out in detail the metes and bounds of the supposed "requirement" of local service which is at the heart of the *Tuck* analysis, the Joint Petitioners invite the Commission to do so

[9] Here again, if the Commission can demonstrate that it indeed has the means to monitor compliance with its supposed programming "requirement", and if it can similarly demonstrate that it has in fact performed such monitoring, the Joint Petitioners invite the Commission provide such a demonstration

channels allotted pursuant to that analysis result in "local service" in any meaningful sense – has proven to be valid in ***any*** situation [10]

V. The recent transmitter site modification application demonstrates the legitimacy of the Joint Petitioners' arguments.

46 Finally, let us put aside the rhetoric and the citations to precedent and the arguments concerning the effect of rules which have been adopted but stayed Let us, in closing, look at what has actually transpired here The proponent of the reallotment repeatedly sneered at the Joint Petitioners' assertions that the proponent planned to relocate its transmitter close in to Columbus, should the reallotment be approved The Joint Petitioners' claims were "purely speculative", according to the proponent The proponent claimed repeatedly that it was not proposing any change in transmitter site

47 And yet, as the ink was still drying on the *MO&O*, Clear Channel was filing its modification application proposing to move the station's transmitter right next door to Columbus [11]

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[10] By making this argument, the Joint Petitioners do ***not*** intend to suggest that the Commission should re-impose ascertainment, program logs, or any other similar hallmarks of the Age of Regulation The elimination of those burdensome obligations has unquestionably had beneficial effects on the broadcast industry Similarly, the Joint Petitioners do not doubt that the notion of "local service" may be a valid regulatory consideration But the Commission ***cannot*** claim to be acting to promote "local service" when the Commission has not defined "local service" and has no way of measuring "local service" and has repeatedly and consistently acted to dismantle any means by which such definition and measurements might be derived Having created – quite properly and for good reason and with the approval of the courts -- a regulatory vacuum, the Commission cannot at the same time make allotment decisions based on considerations which cannot exist because of that vacuum As was the case in *Bechtel*, by taking such an approach the Commission acts arbitrarily and capriciously and, therefore, unlawfully

[11] The Joint Petitioners have filed an Informal Objection to the modification application, pointing out, *inter alia*, that the newly-proposed site, immediately proximate to Columbus, bolsters the Joint Petitioners' earlier arguments while undermining the credibility of the Ashville proponent's non-denial denials The Informal Objection also notes that, contrary to the proponent's earlier assertions, the proposed change would adversely affect existing short-spacings and create the potential for increased interference Since the proponent's earlier assertions were relied upon in the *R&O* herein (at ¶¶3-4), the fact that those assertions have proven less than reliable should not and cannot be ignored here Moreover,

Footnote continued on next page

48 What better way to demonstrate, concretely and unarguably, the legitimacy of the Joint Petitioners' concerns, and the disingenuous emptiness of the proponent's repeated non-denial denials in the face of the Joint Petitioners' arguments? And what better way to test the Commission's real interests when it comes to reallotments? If, as the Commission has claimed, it believes that this reallotment is justified because it will supposedly result in "local service" to Ashville, how can the Commission affirm the reallotment in light of the proposed transmitter site modification, which screams "Columbus, here we are"?

CONCLUSION

49. The allotment at issue here can be justified only through self-delusion and illusion. The Bureau, obviously aware of the new ownership rules, deludes itself into believing that it can simply ignore those new rules and their conceptual underpinnings The Bureau, presumably aware that there is no "local service" requirement nor any regulatory means of monitoring or measuring or assessing "local service", deludes itself into believing that the reallotment can be justified on the presumption that "local service" will ineluctably be delivered to Ashville as a result of the reallotment.

50 And as for illusion, we have the proponent of the reallotment, repeatedly dismissing as "purely speculative" the Joint Petitioners' assertion that, once the reallotment is made, the licensee will move the station's transmitter site to Columbus But sure enough, less than two weeks after the release of the *MO&O*, the proponent files an application proposing to move the station's antenna to a site within the I-270 beltway circling Columbus The proposed

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(Footnote continued for preceding page)
as the Joint Petitioners have urged in their Informal Objection, action on the modification application should be withheld until the Commission has finally resolved the instant allotment proceeding

site -- which happens to be one of the towers which the Joint Petitioners suggested would be proposed by the proponent, *see* Joint Petitioners' Comments in Response to the *RSI* at n 3 – is closer to Columbus (distance from tower to Columbus, approximately six miles) than to Ashville (distance from tower to Ashville, approximately 11 miles) And lest there be any doubt as to who will be picking the management team for the relocated station, since November the licensee has posted on its website solicitations for applications for various jobs at WFCB (including Program Director and General Sales Manager) – applications are to be directed to officials of "Clear Channel – Columbus"

51. So when the mirrors have all been packed away and the blue smoke has cleared, we are left with the reality which the Joint Petitioners have predicted all along: Channel 227B has been reallotted for use as just one more Columbus station, flying the Ashville flag of convenience but otherwise indistinguishable from any other Columbus station.

52. For the reasons stated above, this result is arbitrary, capricious and unlawful

RELIEF SOUGHT

The Joint Petitioners submit that the action of the Bureau below should be reversed, the reallotment of Channel 227B from Chillicothe to Ashville should be rescinded, and this

proceeding should be held in abeyance until the stay of the new ownership rules is lifted, at which time the reallotment proposal should be dismissed as inconsistent with the new rules [12]

Respectfully submitted,

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[12] The Joint Petitioners recognize that, in *Shareholders of Hispanic Broadcasting Corporation*, the Commission approved the proposed transfer of control subject to a condition that elements of that transaction which are inconsistent with the new ownership rules be brought into compliance with the rules within six months of the lifting of the stay While some such conditional approval might be crafted here, the Commission should bear in mind that this is a rulemaking/allotment proceeding which has implications not only for the parties, but also for the overall Table of FM Allotments That is, in a transfer of control situation, the Commission can simply require that the transaction be unwound by the buyer and the seller. No other parties or regulatory interests will be involved. But where the Table of Allotments is affected, the universe of interests potentially affected by even a temporary, conditional allotment is huge because of the interdependent nature of the allotment process Because of that consideration the Joint Petitioners submit that, in this case, holding the matter in abeyance is warranted to avoid harm or prejudice to regulatees not involved in this proceeding

CERTIFICATE OF SERVICE

I, Harry F. Cole, hereby certify that on this 15th day of December, 2003, I caused copies of the foregoing "Application for Review" to be placed in the U.S. Postal Service, first class postage prepaid, or hand delivered (as indicated below), addressed to the following persons:

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