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March 3, 2005

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VIA COURIER

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Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

MAR - 3 2005

Federal Communications Commission
Office of Secretary

**Re: In the Matter of Amendment of Section 73.202(b), Table of Allotments,
FM Broadcast Stations (Hagerstown and Myersville, Maryland), MB
Docket No. 05-4**

Dear Ms. Dortch:

On behalf of Infinity Broadcasting Corp. of Washington, DC, licensee of radio station WJFK-FM, Washington, DC, there is transmitted herewith an original and four copies of Comments in connection with the above-referenced matter.

Please date-stamp the enclosed "Return Copy" of this filing and return it to the courier delivering this package.

Should there be any questions concerning this matter, please contact the undersigned.

Respectfully submitted,

Robert-Paul Sagner

Enclosure

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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MAR - 3 2005

In the Matter of)
)
Amendment of Section 73.202(b),) MB Docket No. 05-4
Table of Allotments,) RM-11133
FM Broadcast Stations)
(Hagerstown and Myersville, Maryland))

Federal Communications Commission
Office of Secretary

To: The Commission

COMMENTS OF INFINITY BROADCASTING CORP. OF WASHINGTON, DC

Infinity Broadcasting Corp. of Washington, DC (“Infinity”), licensee of radio station WJFK-FM, Washington, DC, hereby submits these Comments in response to the Commission’s January 10, 2005, Notice of Proposed Rule Making (“NPRM”)¹ issued in response to the April 16, 2004, Petition for Rule Making (“Petition”) filed by Manning Broadcasting, Inc. (“Manning”), licensee of Station WARX(FM), Hagerstown, Maryland.²

In its Petition, Manning requests that the Commission amend the FM Table of Allotments by reallocating Channel 295B from Hagerstown, Maryland, to Myersville, Maryland, and modifying the license of WARX(FM) to specify Myersville as that station’s new community of

¹ Notice of Proposed Rulemaking, *Hagerstown and Myersville, Maryland*, MB Docket No. 05-4 (rel. Jan. 10, 2005) (“NPRM”).

² See Petition for Rule Making, *Hagerstown and Myersville, Maryland*, MB Docket No. 05-4 (filed Apr. 16, 2004) (“Petition”); Supplement to Petition for Rule Making, *Hagerstown and Myersville, Maryland*, MB Docket No. 05-4 (filed July 28, 2004) (“Supplement to Petition”).

license.³ The Petition also states that Manning is not proposing to change the location of its station's transmitter site⁴ — at least at this time.

Manning's proposal to reallocate Channel 295B from Hagerstown to Myersville, standing alone, would result in a minimal real world benefit because WARX(FM) already provides a protected 0.5 mV/m signal to Myersville. However, if the proposed change to the FM Table of Allotments were to be implemented, it appears that Manning could thereafter relocate the WARX(FM) transmitter site closer to Frederick, Maryland, in order to provide improved service to the larger and more lucrative Frederick market. If the proposed change in the community of license of WARX(FM) is subsequently coupled with a proposal to relocate the station's transmitter site in order to better serve a nearby, larger urbanized area, Manning would evade the showing specifically required by the Commission in *Faye & Richard Tuck, Inc.*, 3 FCC Rcd 5374 (1988) ("*Tuck*").⁵

DISCUSSION

In the Petition, Manning seeks the reallocation of WARX(FM) from Hagerstown, a community with a 2000 U.S. Census population of 36,687 persons, to Myersville, a much smaller community with a 2000 U.S. Census population of only 1,382 persons.⁶ However, because WARX(FM)'s existing protected 0.5 mV/m contour already covers Myersville,⁷ there appears to be no practical purpose behind Manning's proposal to reallocate Channel 295B from Hagerstown to Myersville — unless Manning intends to subsequently modify the station's

³ NPRM ¶ 1.

⁴ *Id.* ¶ 3.

⁵ See also *Headland, Alabama and Chattahoochee, Florida*, 10 FCC Rcd 10352 (1995) ("*Headland, Alabama*").

⁶ NPRM ¶¶ 3-4.

⁷ Supplement to Petition for Rule Making, Attachment.

facilities to specify a new transmitter site. Given that Myersville is located only 11.5 miles from Frederick, a substantial community with a 2000 U.S. Census population of 52,767,⁸ Manning's ultimate goal would appear to be the modification of WARX(FM)'s facilities to provide increased service to the more populous and lucrative Frederick market.

By using this two-step approach — first obtaining a change of WARX(FM)'s community of license through the rule making process and subsequently relocating its station's transmitter site — Manning would evade the Commission's well-established policy of preventing applicants from taking advantage of the first local service allotment priority where the proposed new community of license is part of and dependent on a larger, nearby urbanized area.

While the Commission has held that the provision of first local aural transmission service to a community may be a significant factor in evaluating a petition to change a station's community of license,⁹ it has also made clear that it will not permit manipulation of the allotment process by allowing licensees to use a first local service preference where such a preference is sought for a community that is part of a larger urban area.¹⁰ For this reason, where a station seeks to relocate to a community near an urbanized area, and the station's proposed transmitter site location will allow it to place a city-grade signal over more than 50 percent of the urbanized area, the Commission requires that the applicant demonstrate pursuant to its decision in *Tuck* that

⁸ See Frederick (city) QuickFacts from the US Census Bureau, *available at* <http://quickfacts.census.gov/qfd/states/24/2430325.html>.

⁹ To determine whether a petition to change the FM Table of Allotments will result in a preferential arrangement, the Commission applies the following FM allotment priorities: "(1) First full-time aural service. (2) Second full-time aural service. (3) First local service. (4) Other public interest matters. [Co-equal weight would be given to priorities (2) and (3)]" *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 92 ¶ 7 (1982).

¹⁰ Memorandum Opinion and Order, *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd 7094, 7096 ¶ 13 (1990).

the proposed community of license is independent of the nearby urbanized area.¹¹ In this regard, Manning does not indicate what percentage of the Frederick Urbanized Area is presently covered by WARX(FM)'s licensed facilities, but it appears that Manning would be able to cover the entire urbanized area if it elected to relocate its transmitter site closer to Frederick after its community of license was changed.

The Petition does provide some support for Manning's contention that Myersville is a community for allotment purposes, but provides no evidence that Myersville is independent of Frederick. To the contrary, the Petition acknowledges that the Myersville Elementary School is part of the Frederick County Public School system, and that law enforcement in Myersville is provided by a deputy assigned by the Frederick County Sheriff's Office.¹²

The Commission has consistently held that it will not permit applicants to circumvent the *Tuck* requirement by using a two-step approach. For example, in response to a petition for rule making filed by Secret Communications II, LLC ("Secret Communications") proposing the

¹¹ See *Headland, Alabama* at 10354 ¶ 11; see also *Tuck* at 5378 ¶ 36. The Commission has established eight factors to assess the independence of a suburban community pursuant to *Tuck*:

(1) the extent to which the community residents work in the larger metropolitan area, rather than the specified community; (2) whether the smaller community has its own newspaper or other media that covers the community's needs and interests; (3) whether community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area; (4) whether the specified community has its own local government and elected officials; (5) whether the smaller community has its own local telephone book provided by the local telephone company or zip code; (6) whether the community has its own commercial establishments, health facilities, and transportation systems; (7) the extent to which the specified community and the central city are part of the same advertising market; and (8) the extent to which the specified community relies on the larger metropolitan area for various municipal services such a police, fire protection, schools, and libraries. We have considered a community as independent when a majority of these factors demonstrate that the community is distinct from the urbanized area.

Tuck at 5378 ¶ 36.

¹² See Petition at 3.

reallotment of Channel 227B from Chillicothe to Ashville, Ohio and the corresponding change of station WFCB's community of license to Ashville, the Commission ruled that, even though Secret Communications had not proposed in its petition the relocation of the station's transmitter site, it was required to make a supplemental showing pursuant to *Tuck* that Ashville is independent of Columbus, Ohio.¹³ The Commission justified this requirement on the basis that, "as an Ashville station," it would be "possible to relocate the Station WFCB transmitter to a site that would serve most, if not all, of the Columbus Urbanized Area."¹⁴ For this reason, "[h]ad Secret Communications proposed this site in its petition for rule making, we would have required a showing pursuant to *Faye and Richard Tuck* to demonstrate that Ashville is independent of the Urbanized Area and therefore entitled to consideration as a first local service."¹⁵

In accordance with past Commission precedent, the Commission therefore should either require Manning to supplement its Petition with the showing required by *Tuck* that demonstrates that Myersville is independent of the Frederick Urbanized Area, or make an affirmative representation that it will not seek to relocate the WARX(FM) transmitter site closer to Frederick following the implementation of the proposed change to the FM Table of Allotments.

Respectfully submitted,

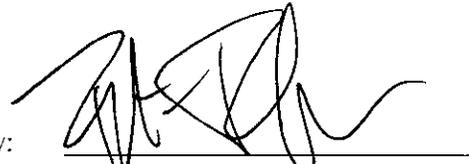
**INFINITY BROADCASTING CORP. OF
WASHINGTON, DC**

¹³ Request for Supplemental Information, *Chillicothe and Ashville, Ohio*, 18 FCC Rcd 11230, 11230-31 ¶¶ 2-3 (2003).

¹⁴ *Id.* at 11231 ¶ 3.

¹⁵ *Id.* See also Request for Supplemental Information, *Lincoln and Sherman, Illinois*, 19 FCC Rcd 17446, 17446-47 ¶¶ 2-3 (2004) ("the procedure of first proposing only a change in community of license and subsequently proposing the relocation of the transmitter site would effectively circumvent a specific Commission requirement that the licensee submit a showing pursuant to *Faye and Richard Tuck*.")

By:



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Its Attorneys

March 3, 2005

CERTIFICATE OF SERVICE

I, Rossana Baptista, a secretary in the law firm of Leventhal Senter & Lerman PLLC, do hereby certify that I sent by overnight courier on this 3rd day of March, 2005, a copy of the attached "Comments of Infinity Broadcasting Corp. of Washington, DC" to the following:

David D. Oxenford, Esq.
Veronica D. McLaughlin-Tippett, Esq.
Shaw Pittman, LLP
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Rossana Baptista