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5629 Charing Place
Charlotte NC 28211

September 28, 2005

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
9300 East Hampton Drive
Capitol Heights, MD 20743

DOCKET FILE COPY ORIGINAL

Re: FM Allotments NPRM, MB Docket No. 05-210, RM-10960

Dear Ms. Dortch,

Enclosed please find one signed original and nine copies of my *Comment* to the subject *NPRM*. In addition to the required original and four copies, I am also providing five copies for the Commissioners in accordance with 47 CFR 1.419(b).

Respectfully,

William B. Clay

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of:	)	
	)	
Revision of Procedures Governing Amendments	)	MB Docket No. 05-210
To FM Table of Allotments and Changes	)	RM-10960
Of Community of License in the Radio Broadcast	)	
Services	)	

To: The Commission

COMMENTS TO
NOTICE OF PROPOSED RULE MAKING

William B. Clay
5629 Charing Place
Charlotte, N.C. 28211

September 30, 2005

Signed
Original

Summary

The above-cited *NPRM* seeks comment on proposals to streamline, *inter alia*, the "FM move-in" process and on their possible effects upon the Commission's obligation under 47 USC 307(b) "... to provide a fair, efficient, and equitable distribution of radio service ..."

Nearly all FM move-ins are now enabled by "first local service" preference, which is purported to help fulfill the Commission's 307(b) obligation. Like the "integration" preference that the Court rejected in 1993's *Bechtel* decision, "first local service" preference is grounded upon a prediction of the radio service that will be provided pursuant to that preference. However, the Commission has long failed to define how "local service" can be measured, has abolished every regulatory mechanism by which it might be fostered and demonstrated, and has failed to ensure existence of any market incentive to provide it. We contend this renders the "first local service" preference arbitrary, capricious, and therefore unlawful. *The changes proposed by the* NPRM *will not remedy this egregious flaw.* Fortunately, the *NPRM* asks questions that can lead to remedies for this widely and shamelessly exploited regulatory vacuum.

We show that the regulatory history recounted by the *NPRM* ignores some important changes – the very changes that cause the problems of which the *NPRM's* proponents complain. We summarize the real-world effects of these changes on FM frequency allocation. Then we look at the same landscape through the distorting lens of meaningless regulatory distinctions and unsupportable metrics of public benefit. We cap this foundation by defining two simple metrics that the Commission can easily use to confirm or refute our contentions.

Answering key questions of the *NPRM* with findings of our outstanding *Application for Review*, we suggest changes in the processes and criteria proposed by the *NPRM*. These adjustments would favor FM reallotment outcomes that more consistently provide the public benefit invariably claimed but seldom produced by urban reallotment proponents.

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I. Introduction

A. Scope of Comment

1. This comment responds to three key questions posed by the above-captioned *Notice of Proposed Rule Making ("NPRM")*. Paraphrasing broadly, those questions are:

- Should changes in FM communities of license be one-step minor modifications?[1]
- Will such a process effectively discharge Congress's 47 USC 307(b) statutory mandate "... to provide a fair, efficient, and equitable distribution of radio service ..."?[2]
- Are new criteria needed to determine when first local service may be withdrawn from one community to provide first local service for another community?[3]

We also respond to several related but less fundamental questions asked by the NPRM.

2. Commenters who capably represent commercial broadcasters' economic self-interest will doubtless respond amply and favorably to the NPRM's proposals for streamlining the process to change FM stations' communities of license. This comment focuses only on those aspects of the process that seem likely to prejudice the public benefits of its end results. We do not respond to several other issues raised by the NPRM, particularly those related to AM licensing and to FM "drop-in" allotments[4].

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[1] *NPRM*, ¶¶14-29.

[2] *NPRM*, ¶28.

[3] *NPRM*, ¶¶40-46.

[4] The current flood of "drop-in" FM allotment proposals (*NPRM*, ¶31) may be partly a defensive strategy to preclude exploitation of the move-in process for otherwise unobtainable rural-to-urban FM station reallotments. We lack the analytical means to test this hypothesis and it is not central to our arguments. However, to whatever extent it may be true, the measures advocated here could slow this trend without imposing new fees on broadcasters.

B. Commentor's Interest

3. We reside in Charlotte, N.C. and have no direct financial interest in the commercial broadcasting industry. In March 2002, we became aware of Susquehanna Radio Corporation's ("SRC") intent to uproot long-established station WABZ(FM)[5] from Albemarle, N.C. and move it to the Charlotte urban area[6]. While evaluating the likely consequences of SRC's initiative, we learned of the regulatory mechanisms that make this and many other FM move-ins possible by claiming they will provide public benefits that we contend are a wholly fictional regulatory mirage. We have since opposed SRC's move-in in several pleadings[7]. Our *Application for Review ("Clay AR")* is presently pending before the Commission.

4. Our *Application for Review* anticipated First Broadcasting's proposal[8] for a one-step FM move-in process[9] by exactly one month. Despite some similarities, the process we suggested then and develop more fully below provides substantially greater safeguards for Congress's 307(b) statutory mandate than the process proposed by First Broadcasting and described by the

---

[5] Facility ID 52553, now operating in the Charlotte metro under call sign WPZS.

[6] This move-in comprised SRC's purchase of the station (Media Bureau File Nos. BALH-19980220GF, assignment of license, and BTCH-19980220GG, transfer of control), reallotment of its channel (MM Docket No. 99-240, RM-9503, culminating in R&O DA 01-1660), construction permit (Media Bureau File No. BPH-20020116AAG, minor modification), sale to Radio One (BAPLH-20040810AAD, assignment of permit/license), and operating authority at the new site (BLH-20041102AJC, license to cover, and 20041102AJO, program test authority).

[7] Media Bureau File No. BPH-200201016AAG: Clay *Informal Objection* filed 4/30/02, SRC *Opposition to Informal Objections* filed 05/23/2002, Clay *Reply to Opposition of Susquehanna Radio Corp.* filed 06/03/2002, Media Bureau *Denial of Informal Objections* dated 1/6/2004, Clay *Application for Review ("Clay AR")* filed 2/5/04 with *Errata* dated 2/6/04, SRC *Opposition to Application for Review ("SRC Opp. to Clay AR")* filed 2/20/2004, and Clay *Reply to Opposition ("Clay 2nd Reply")*, filed 2/25/04.

[8] *Petition for Rulemaking ("First Broadcasting Petition")*, filed March 5, 2004 by First Broadcasting Investment Partners, LLC, Dallas TX, which led directly to the instant proceeding.

[9] *Clay AR*, footnote 44.

NPRM. Nonetheless, our suggestions still provide many of the streamlining benefits desired by all parties to the FM reallotment process.

5. We continue to contest SRC's claims of public benefit for its Indian Trail move-in (which it has since sold to Radio One). Even so, we can agree with SRC on one thing: that proceeding is a fitting example of the inefficiency and ineffectiveness of the current FM move-in process.[10]

C. Where's the Beef?

6. The *NPRM* is grounded upon an assumption that we believe is no longer valid after more than two decades of deregulation. It can be stated thus:

> Residents, businesses, and organizations in an FM station's community *of license* benefit from a radio transmission service that provides them more opportunity for local self-expression than other radio services they may receive.

This assumption is unquestioned in the *NPRM,* but is fundamental to its chain of reasoning. To establish a foundation for our responses to some of the questions posed by the *NPRM*, we must begin by examining this assumption. Once this foundation is laid, we respond clearly and directly to the *NPRM's* questions.

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[10] *Comments* by Susquehanna Radio Corp. ("*SRC Comment*") to First Broadcasting Investment Partners' *Petition for Rulemaking*, RM-10960, filed May 24, 2004, ¶3. Despite SRC's complaints of lengthy delays, broadcast industry press releases indicated that SRC realized approximately $8M net profit on its investment of less than $3M. This represents an annual yield of around 50%, which SRC realized without even starting the station's move into the Charlotte area.

II. The Real World[11]

7. Anyone over age 35 who listens to FM radio has noticed big changes since the early '90s – but not everyone heard the same changes. Urban listeners heard a gradual but inexorable increase in the number of metro-area FM stations. At station ID time, most of the newcomers claim to serve some outlying town or suburb, but their programming, their advertising, and their own promos focus almost exclusively on the larger urban area. Meanwhile, in rural areas – especially rural areas adjacent to urban centers – listeners heard their local FM outlets suddenly go silent and disappear. They, too, noticed an increase in the number of stations they could receive, but in near-urban areas, most of the gain was in urban stations that don't cater to small town advertisers or cover small town news and activities.

8. One change sounded the same to both urban and rural listeners: increasing homogenization of programming, as ownership consolidated, voice tracking and clustering reduced costs, and chain broadcasters offered advertisers packages to target nearly any audience demographic and geography. It took over a decade for the public to react, but response to the Commission's *Localism* inquiry[12] suggests substantial public doubt of claims that radio choice increases hand-in-hand with ownership concentration.

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[11] Analysis of all urban, non-competitive FM changes of community of license 1998-1999 supports much of this broadly generalized account for at least 60% of urban FM move-ins during that period (*Clay AR*, ¶¶30-34 and Table A).

[12] *Notice of Inquiry on the Matter of Broadcast Localism ("Localism NOI")*, MB Docket No. 04-233, to which over 82,000 written public comments have been filed to date.

III. The Regulatory World

9. From the regulatory perspective, all these real-world changes purportedly increased the net public benefit. But more than 20 years of selectively adapting some rules to a market-driven environment while carefully leaving other rules unchanged since the "age of regulation" have created a system of jargon and preferences that makes private gain look like public service. Some of the *NPRM*'s proposals continue in that same tradition. If adopted as offered, they will amplify the system's already harmful effects by creating faster, more efficient processes that diminish the few remaining opportunities for challengers to question the benefits claimed for changes in FM stations' communities of license. Let us review how more than two decades of regulatory changes have led directly to problems of which both we and *NPRM* proponents complain.

A. A Self-Serving History Lesson

10. The *NPRM* opens by examining the relevant regulatory history.[13] Unfortunately, like many near-contemporary histories, this one seems intended to promote a specific agenda rather than to provide a dispassionate perspective on events.

11. The *NPRM* states the "... last major development in the area of FM allotments was in 1982, when the Commission revised the priorities for alloting FM channels ..."[14] The *First Broadcasting Petition* recites "dramatic changes" in the FM Table of Allotments since then, including thousands of new allotments, four new channel classes, and "innumerable" changes in community of allotments. It then notes the "exponential" increase in the complexity of the

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[13] *NPRM*, ¶¶5-7.

[14] *NPRM*, ¶6, referring to *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982) *("FM Assignment Policies")*.

FCC's task, the increasing time to needed to complete FM allotment changes and the consequent increased cost to proponents, the Commission, and the public interest.[15]

12. Both of these accounts ignore more recent regulatory changes that directly cause much, if not most, of the present FM allotments processing overload. In decreasing order of apparent causality, they include:

- Elimination of competition when an FM or TV licensee's request to change their community of license is mutually exclusive with their existing license[16] (1989).
- Abolition of national FM ownership caps and relaxation of local caps, especially by the *Communications Act of 1996.*
- Relaxation of the main studio rule, first removing any obligation to originate programming in the community of license[17] (1987) and then permitting FM studios to be located as much as 80 miles from their community of license[18, 19] (1998).

The *NPRM* focuses upon the FM allotment process without examining the broadcast property market forces that are the process's prime mover. This repeats the near-sightedness of the *New Community MO&O*, which we describe in an earlier pleading[20].

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[15] *First Broadcasting Petition,* p. 6-7.

[16] 47 CFR 1.420(i) as amended by *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License ("New Community MO&O")*, MM Docket 88-526, RM-6122, 4 FCC Rcd. 4870.

[17] *Main Studio and Program Origination Rules for Radio and Television Stations ("Main Studio II")*, 2 FCC Rcd 3215, 3218, ¶38.

[18] *Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations ("Main Studio III")*, 13 FCC Rcd. 15691, 15696, ¶26.

[19] Franklin Communications, *et al* in *Comments in Response to "Request for Supplelemtal Information" ("Joint Petitioners Comments to RSI")* filed July 17, 2003, MM Docket No. 99-322, RM-9762, ¶37-39 and footnote 19.

[20] *Clay AR*, ¶¶23-25.

13. While the rule-making process adopted the three changes cited above without much consideration of their interaction, the broadcasting property market didn't miss their synergistic effect. Urban move-ins would generally be impractical without the first of these changes and many urban move-ins combine all three. The Commission's chronology of increased "drop-in" allotments[21] begins the year after the last of the three. The end results are the real-world changes described in Section II above.

14. Commissioner James Quello did not suffer from the *New Community MO&O's* near-sightedness. In 1989 he clearly foresaw the effects now cited by First Broadcasting:

> [This] decision will give licensees the ability, indeed the incentive, to change their communities of license, modify their facilities, or both.
>
> ...
>
> [It] will set in motion the entire table of allotments for the FM and television services.[22]

As Quello's prediction implies, many of the problems the *NPRM* seeks to resolve could be eliminated at a stroke simply by deleting rule 47 CFR 1.420(i). But wait! Proponents of the move-ins that §1.420(i) makes practical claim substantial public benefits for their changes. How are those benefits defined and demonstrated?

B. The Miracle Move-In Mix

15. The Commission's latest definition of FM frequency allocation priorities is *Revision of FM Assignment Policies and Procedures ("FM Assignment Policies")*, which defines four priorities, the middle two being equal:[23]

1. First full-time aural service.
2. Second full-time aural service.

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[21] *NPRM*, ¶31.

[22] *Dissent Statement of Commissioner James H. Quello*, 4 FCC Rcd 4870, 4877-4878.

[23] *NPRM*, ¶6, citing 90 FCC 2d 88.

3. First local service.

4. Other public interest matters.

There are now few areas in the US that do not receive at least two full-time radio services, usually leaving only priorities 3 and 4 operative.

16. Priority 4 generally favors allocation to communities with fewer aural and local services,[24] but commercial licensees seldom seek to move from large, well-served areas to smaller, poorly-served areas. Priority 3 combined with §1.420(i) is the miracle move-in mix that has enabled nearly all recent changes in community of license.[25]

17. So when a commercial broadcaster boasts of "introducing first local service and expanded service to the public,"[26] it may simply mean they have found and purchased a small-town FM station to which this miracle move-in mix can be applied, then uprooted, rebranded, and moved it to a more profitable urban market. Three of the four FM reallotment proceedings SRC cites as "not completely satisfactory[27]" fit this profile. The miracle mix accomplished what is otherwise a regulatory impossibility: creating new full-power FM stations in the Atlanta, Charlotte, and Louisville metros. Of course, this is because of the reallotments' "substantial and beneficial effect on the distribution of radio service"[28] – at least when viewed through the distorting lens of policies whose conceptual foundations were deregulated away during more than two decades.

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[24] *FM Assignment Policies,* ¶12, footnote 8.

[25] For example, of the 52 simple §1.420(i) reallotments sought in 1998-1999, only four did not justify their reallotment upon this priority. One of those four was in rural Colorado and claimed priorities 1 and 2; the other three failed. See *Clay AR* ¶28 and Tables B and C.

[26] *SRC Comment*, ¶6.

[27] *SRC Comment*, ¶¶1-5.

[28] *SRC Comment*, ¶6.

IV. "Local Service:" Past, Present, and Future

18. Proponents of streamlining the process for changing FM stations' communities of license pay ample but superficial lip service to the spectrum allotment mandates imposed by Congress in 47 USC 307(b).[29] While they advocate radical changes in processes supposedly intended to advance those mandates, they fail to ask whether the processes still fulfill Congress's §307(b) mandates in today's environment, which two decades of deregulation has, in their words, "dramatically changed." Fortunately, the *NPRM* solicits comment on several aspects of that issue.[30]

19. We have shown in earlier pleadings that current policy favoring "first local service" is ineffective in the case of rural-to-urban reallotments.[731] Current allocation rules make "first local service" the crux of nearly every FM reallotment, but the Commission has not defined how "local service" can be measured, has abolished every regulatory mechanism by which it might be fostered and demonstrated, and rejects nearly every opposition showing that proposed coverage patterns create strong *dis*incentives to provide anything that might fit a common-sense definition of "local transmission service" for the community *of license.*

20. We contend the first local service allocation preference so manifestly fails to achieve the Commission's clearly-defined objective of local self-expression as to be arbitrary, capricious, and therefore unlawful. It shows an uncanny similarity to exactly the characteristics of the old "integration" preference that the Court cited as unacceptable in its 1993 *Bechtel* decision.[32] And,

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[29] For example, *First Broadcasting Petition*, p. 17: "... to ensure the true intent of Section 307(b) is realized ..." and supporting *Comments* of Cumulus Licensing *et al ("Cumulus Comment")*, p. 21, Section IV: "... [the proposed] policies will more efficiently help the Commission efficiently [*sic*] carry out the mandate of Section 307(b) of the Communications Act."

[30] *NPRM.* ¶28.

[31] *Clay AR*, ¶¶31-35.

[32] *Clay AR*, ¶¶36-38, citing *Bechtel v. FCC*, 10F.3d 874 (D.C. Cir. 1993).

as shown in Section III.B above, first local service is one of two "miracle ingredients" required for almost every recent FM reallotment.

A. What Does "Local Service" Mean?

21. We have seen that recourse to first local service preference is an indispensable enabler of the vast majority of recent FM reallotments. Thus, how "local service" is defined determines whether most FM reallotments ultimately provide the *local self-expression* that is the Commission's sole rationale for its 3rd allocation preference.[33] But despite this central importance, a long series of deregulatory changes[34] have left the term "local service" with only one tangible and enforceable meaning: provision of "city-grade" signal strength over an FM station's community of license[35] – that is, *reception* service, not the *transmission* service that local service is purported to provide.

22. To be sure, the Commission and licensees regularly assert with unanimity, broadcasters "must serve their local communities."[36] However, the Commission decided that "market forces, in an increasingly competitive environment, would encourage broadcasters to accomplish this goal, and that certain rules were no longer necessary."[37] But note carefully: a station's "market" is not the same as its "community *of license*." In an urban setting, an FM move-in's community of license typically comprises less than 10% of its market's population and is often less

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[33] The Commission's most recent extended explanation of the rationale for its first local service preference is *Faye & Richard Tuck ("Tuck")*, 3 FCC Rcd. 5374 (1988). *Tuck* names "local self-expression" three times as the objective local service (¶¶20, 22, and 32) and offers no other rationale for local service preference. More recently, the *Localism NOI* (¶2) recalls the Supreme Court's 1955 observation that "[f]airness to communities [in distributing radio service] is furthered by a recognition of local needs for a community radio mouthpiece."

[34] *Joint Petitioners Comments to RSI,* ¶¶27-45 provides a detailed history of these changes.

[35] 47 CFR 73.315(a), the "community coverage rule."

[36] *Localism NOI,* ¶1, a recent example of a nearly infinite series of such proclamations.

[37] *Localism NOI,* ¶1.

than 1%.[38] What market force would induce such a station to be a consistent outlet for the self expression of a tiny fraction of its potential audience? For example, would its advertising be affordable to the community-of-license businesses that serve such a small part of its audience?

23. While the record leaves little doubt the Commission's sole objective for its first local service allocation preference is self-expression for the community *of license*, most of the Commission's discussions of "local service" are ambiguous. For example,

> Sensitive to the First Amendment concerns inherent in any form of content regulation, the Commission has never attempted to define with exact precision the programming that a broadcaster should air to serve the needs and interests of its local community.
>
> ...
>
> [I]n the 1980's, the Commission eliminated the guidelines and looked to marketplace forces and issue-responsive programming obligations to ensure that broadcasters air community-responsive programming.[39]

Note "local community" and "community," but not "community *of license*." This consistent pattern of ambiguity opens a huge regulatory hole, which we contend is the genesis of much or most of the present FM allocations processing volume.

24. The Commission's failure to establish a durable bright line that distinguishes "transmission service for the community *of license*" from "service to the local community" has led to massive misapplication of first local service preference in urban FM reallotments. But the Commission's *Tuck* policy implicitly defines which "community" should *receive* local service, just as it explicitly defines which communities *merit* local service.

25. *Tuck* defines eight criteria to determine whether a community is sufficiently independent from its metro area to merit its own local transmission service[40]. Those criteria show

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[38] *Clay AR* Table A.

[39] *Localism NOI,* ¶12.

[40] *Tuck*, ¶36.

that first local service priority was *not* conceived to yield undifferentiated self expression of the entire area that a full-power FM station is likely to cover. Rather, it is unmistakably intended to provide self expression for the people, businesses, institutions, and activities that comprise the independent identity of the community *of license*. *Tuck's* community independence criteria are:

- employment of its residents locally rather than elsewhere in the metro area,
- its own media, including newspapers,
- perception of community independence by its leaders and residents,
- its own community government and elected officials,
- its own telephone book and/or ZIP code,
- its own businesses, health facilities, and transportation systems,
- independence of its advertising market from the metro-area market, and
- independence from metro-area public services such as police, fire protection, etc.

Each examines the independence of entities *within the single community under consideration*. Only two (telephone book and ZIP code; advertising market) name inanimate entities that could not directly and beneficially use broadcast radio self-expression. To pretend that a frequency allocation decision justified solely upon these eight characteristics of a single, clearly defined geographic area[41] may then be implemented with complete disregard for the geographic area for which it provides transmission service is the height of sophistic and nonsensical rationalization.

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[41] *Tuck*, ¶40 reaffirms two other *Huntington* tests (*Huntington Broadcasting Co. v. FCC*, 192 F 2d 33, 35 [DC Cir. 1951]), but ample precedent has rendered them essentially irrelevant (see, for example, *Ada, Newcastle and Watonga, Oklahoma Report and Order*, DA-1951, RM-8707, MM Docket No. 95-175, ¶17). We cannot identify any §1.420(i) reallotment in which the *Huntington/Tuck* geographic and population criteria trumped the community independence criterion. We invite correction by reply comment.

26. When pressed to show any regulatory obligation for an FM station to serve its community *of license* with anything beyond reception service, the Commission and reallotment proponents are able to invoke only two surviving rules. The NPRM itself, after stating "... a station has a particular obligation to serve its community of license ..."[42] and appending six lines of footnotes citing generalized and unenforceable admonitions,[43] names only §73.1120 and §73.3526(e)(12). The first is simply a definition, stating that a station's community of license is "considered to be the geographical station location." The second is a *documentation* requirement, not a programming requirement. It requires quarterly reports of "programs that have provided the station's most significant treatment of community issues," but does not mandate any target quantity of such programming nor any penalty for failing to provide such programming, and does not specify if the "community" at issue is exclusively the community of license. Most broadcasters interpret "community" in this context to mean their entire coverage area.[44]

27. Thus, *there remains no measurable or enforceable regulatory obligation for a radio station to provide transmission service to its community of license.* Market forces are the only possible inducement for a commercial broadcast station to provide self-expression to its community of license.[45] But we've already seen that the community of license is a tiny fraction of most recent urban FM move-ins' market.

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[42] *NPRM*, ¶44.

[43] Most of which fail to distinguish between "community" and "community of license."

[44] See, for example, *SRC Opp. to Clay AR*, which responds to our assertion that its Charlotte metro move-in would not serve its community *of license* by attaching 33 pages listing service to its stations' *entire coverage areas*. (Clay 2nd Reply, ¶13 and Table A).

[45] Some may contend a station will be motivated to provide self-expression for its community of license due to the threat of a petition to deny license renewal should they fail to do so. We know of no such case since 1981's radio deregulation. We invite correction by reply comment.

28. A reasonable person might ask, "Why would the Commission grant 'first local service' preference to an FM station that has no strong incentive to provide the self-expression for the community of license that's the *raison d'etre* of that preference?" The short answer is, "The Courts made them do it."[46] But the Courts' reasoning was based on the existing two-step process (frequency allocation, then construction permit) and seems moot in a one-step process[47] similar to what is now proposed.

B. How Can Local Service Be Demonstrated?

29. There are two metrics that can easily confirm or deny our claims that recent FM move-ins do not deliver the community-of-license self expression upon which their reallotments are justified. For each FM station of interest they are:

- Population ratio: of the population within the station's 60dBu contour (alternatively, within its Arbitron market) the percentage that resides in its community of license.
- Transmission service ratio: of all airtime for advertisements, PSAs, public events, and public affairs programming, the percentage by or for organizations and events principally located in the community of license[48].

The first metric can support our claims only implicitly, but has the advantage that it can be computed prospectively from publicly-available data. The second metric is dispositive of our claims,

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[46] *New Radio*, 804 F.2d at 761 cited by *Tuck*, ¶33. See also *Tuck*, ¶¶22-25 listing several decisions critical of the Commission's attempts to give significant decisional weight to the size and proximity of a proposed community of license with respect to its urban neighbors.

[47] *Clay AR*, ¶¶16-19 and footnote 35.

[48] This metric *excludes* organizations or events that are coverage-area wide unless the advertisement or programming focuses specifically upon a subdivision in or principally serving the community of license. "Principally located" and "principally serving" being to some extent a question of judgment, the criteria for this determination should be fully disclosed for every such data set.

but requires non-public data and can only be computed retrospectively. The second metric, if available, would also validate or refute the inferential value of the first.

30. In earlier pleadings, we provided population ratios of all urban §1.420(i) move-ins during 1998-1999 for which the necessary data were available from their proceedings' documentation[49]. The highest percentage of community-of-license population coverage we found was 4.6%; of the seven proceedings for which the data were available, only two exceeded 1%. Unfortunately, the necessary data were not available for 20 of the 27 move-ins. We invite Commission staff or proponents of reallotment streamlining, to whom the requisite data and tools are readily available, to provide the missing data for these years and to extend this analysis to more recent years. Given the resources devoted to advocating the *NPRM's* changes, we believe that any failure of proponents to provide these data suggests the results would confirm our contentions even more convincingly[50].

31. The Commission has abolished any record-keeping requirement that could allow the Commission staff or the public to develop the second metric, so only licensees can provide the data necessary to compute it. Further, some elements of the metric as defined above may not be maintained by some stations. But all commercial stations must reliably account for advertising airtime, which guarantees data availability for at least that component of the transmission service ratio[51]. Should streamlining proponents fail to provide at least a reasonable sample of these data, we urge the Commission to seek it by a request for supplemental information from a representa-

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[49] *Clay AR*, Table A, columns "pop CL," "pop cov," "G," and "CL %."

[50] *SRC Opp. to Clay AR* offered no comment on these findings nor did it fill in missing data.

[51] Licensees may claim difficulty determining whether an entity is principally located in their community of license. Should a licensee be insufficiently familiar with their community of license and advertisers to reliably make that determination, the billing address for advertising charges could substitute for their lack of community knowledge.

tive subset of licensees who have been granted first local service preference in recent §1.420(i) proceedings and who are now on the air serving their new community of license.

32. Fortunately, we have recourse to one small data set from which we can develop a statistic similar to the transmission service ratio as defined here. *SRC Opp. to Clay AR* provided attachments that listed, *inter alia*, the public affairs programming of some stations licensed to minor communities of urban areas. For the five stations that provided usable quantitative data, average public affairs programming for the community *of license* ranged from WWWQ's maximum of 7 min./week (0.07% of airtime) to a minimum of zero (three stations)[52]. WWWQ was also covered by our 1998-1999 analysis of §1.420(i) reallotments, in which we computed its population ratio as 1%.[53] This example supports inference that significant local service for a community *of license* will *not* be provided if the community of license is a small fraction of total covered population (*i.e.*, a low population ratio implies a low transmission service ratio). We found no counterexample, even though our source data were provided by a licensee seeking to establish that it indeed provides local service for its communities of license[54].

33. Some may claim our contentions are a side show, irrelevant to the procedural questions that are the *NPRM's* real payload for commercial broadcasters. However, the meaning of "local service" underlies every 307(b) question raised by the *NPRM*. If our contentions are not convincingly demonstrated to be false, the effectiveness of the entire FM reallotment process, present or proposed, to consistently fulfill Congress's 307(b) mandate is open to doubt. There is

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[52] *Clay 2nd Reply*, Table A, columns "CL Pgm" and "%."

[53] *Clay AR*, Table A, columns "pop CL," "pop cov," "G," and "CL %."

[54] But the same source did provide another reinforcement of our claim that small suburban communities of license are meaningless "flags of convenience:" one unnumbered page stated, "City of License: Cincinnati" for the three stations of SRC's Cincinnati cluster, WRRM, WMOJ, and WYGY. The latter two are licensed to Fairfield and Lebanon OH, respectively.

no public benefit in streamlining a process that demonstrably and predictably fails to fulfill its clearly stated regulatory objectives and that is therefore arbitrary, capricious, and unlawful.

C. This Time, Get it Right: Abolish Local Service Preference or Give it Meaning

34. We have now established a factual basis from which to answer some of the *NPRM's* questions.[55]

35. ***Q***: Are the allotment priorities and numerous other allocations rulemaking policies sufficient to limit relocation of radio stations from rural areas to communities in or adjacent to Urbanized Areas?

36. ***A***: No, current policies have allowed a substantial increase in urban clustering and in the consequent preclusion of local service in a wide zone surrounding urban areas. An examination of FM spectrum occupancy in nearly any large urban area suggests that the *only* brake on urban clustering is frequency spacing rules, which have been gradually diluted to promote spectrum efficiency.[56] Urban move-ins have been occurring at an accelerating pace for more than 15 years by recourse to first local service preference. As we have asserted elsewhere:

> Thus, engineering considerations apart, there is now effectively a single criterion for reallotment of a channel under first local service priority: the existence of an incorporated or otherwise recognizable community that has a zip code, school, businesses bearing its name, etc. and that is not yet named in any radio license. ... it's a rare suburb in which several of the *Tuck* community independence criteria cannot be easily satisfied.[57]

37. Yet despite this migration of stations to urban areas, we have demonstrated that the current "well-developed" reallotment policies utterly fail in urban areas to deliver the sole objective of first local service preference, local self expression for communities *of license*. Instead,

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[55] The questions paraphrased in this section are posed by *NPRM*, ¶28.

[56] For example, the short-spacing permitted by §73.215 contour protection; subdivision of Class C into five classes.

[57] *Clay AR*, ¶18.

these policies create just another metro-area station that has strong economic incentives to appeal to an audience as broad as its coverage area and that has no compulsion – market or regulatory – to provide distinctive self-expression for its community of license.

38. Finally, such move-ins' preclusive effect obstructs *real* local self expression ("localism") at least two different ways:

- It fills a rare hole in the urban spectrum that could be filled by an LPFM (Low Power FM, the Commission's newest FM broadcast service) licensee, which, by virtue of its limited coverage *must* serve genuinely local interests to obtain an audience.
- It precludes replacement at the losing community. While spacing rules might permit insertion of an LPFM station, that doesn't replace the commercial radio service that was lost.

39. ***Q***: Are there other procedures that should be implemented to ensure that Section 307(b) will receive full consideration?

40. ***A***: Yes. For the reasons recounted here and elsewhere, abolish the first local service allocation priority in the FM broadcast service. As we have demonstrated, the Commission's long-standing failure to define metrics for local service, to verify that it is provided, or to ensure existence of market incentives to provide local service for communities *of license* has created a frequency allocation mechanism that works directly counter to Congress's 307(b) mandate. Section 307(b) would receive fuller consideration if only the three other priorities remained in force.

41. If the Commission cannot or will not abolish first local service allocation priority, then it must effectively restrict its application to locations and situations in which coverage patterns and market forces will motivate licensees to provide local self expression to the proposed

community *of license*. We suggest *all* of the following measures as a minimum requirement for recourse to first local service preference in *any* §1.420(i) proceeding, urban or rural:[58]

- Make FM reallotment a one-step process that combines the requirements of the current rule making and application steps. This would require licensees to disclose their intended facility location, power, and coverage pattern at frequency allocation time instead of a convenient and fictitious "reference site."
- Allow claims of first local service preference only for facilities that demonstrate at least a 2/3 (66.6%) population ratio as defined in paragraph 29 above[59].
- Require any minor modification application for a station whose frequency allotment was based on §1.420(i) and first local service preference to repeat a showing of at least a 2/3 population ratio until two successive decennial US census cycles show population of the community of license[60] has declined at least 1/3 (33.3%) from the population showing used to establish the claim of first local service preference[61].

42. The Commission has long resisted measures that create incentives for applicants to propose less than maximum-power facilities for their class, wishing to avoid inefficient spectrum utilization.[62] However, eviscerating an allocation criterion of fundamental importance to favor a

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[58] To eliminate varying treatment of "local service" in situations where *Huntington/Tuck* do and do not apply (*e.g.*, *Beaufort County*, 787 F.2d at 653-54, cited in *Tuck*, ¶33).

[59] To adapt this metric to rural areas, allow applicants to attribute the population of immediately adjacent rural areas (*i.e.*, those areas in which there is no intervening incorporated or otherwise recognizable community that can be demonstrated to meet the *Tuck* independence criteria with respect to the proposed community of license) to that of the proposed community of license.

[60] Including any area included in the original showing that has been incorporated, annexed, or split into a separate municipality since that original showing.

[61] Or, for beneficiaries of first local service preference prior to this regime, the population of their community of license in the decennial census preceding their successful petition for rule making.

[62] See, for example, *Tuck*, ¶31.

criterion of lesser importance is irrational. Local service has repeatedly been confirmed by the Courts to be of greater importance than spectrum efficiency.[63] Second, there is no requirement that *every* allocation be made on the basis of its local service,[64] so applicants are free to propose maximum-power facilities under the Commission's fourth allocation priority. Finally, the Commission may deny otherwise acceptable allocations on the grounds of spectrum inefficiency. Availability of LPFM would seem an adequate response to previous Court concerns that small suburban communities might thus be denied the "mouthpiece" to which they may claim legitimate entitlement under 307(b).

V. Procedural Safeguards

43. We believe that widespread and continuing misapplication of first local service preference is the root cause of the delays and inefficiencies of which First Broadcasting and its allies complain. We have offered two straightforward alternative remedies for that misapplication. We believe that either of them is likely to restore the flow of reallotment requests to historic (pre-*New Community MO&O*) levels that traditional Media Bureau staffing levels and processes can sustain. Even if that does not occur, it is foolish to streamline a process that so clearly fails to achieve its regulatory objectives before that failure is rectified.

44. If such a conservative approach has a reasonable chance of resolving the current problems, it is reckless to radically alter mechanisms at the heart one of the Commission's most sacred public trusts: fair and equitable distribution of radio service to *the public*. In an earlier pleading, we showed that the *New Community MO&O* created unexamined interactions with other near-simultaneous rule changes and yielded a variety of undesirable consequences that the

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[63] *Tuck* ¶32.

[64] *Tuck* ¶32.

Commission failed to anticipate – or at least declined to acknowledge.[65] It seems especially unjustified to make such radical changes when their most immediate and indisputable result would *not* be the public benefit[66] but windfall private profits instead. From this perspective, we respond to several other questions posed by the *NPRM.*

45. ***Q***: Should changes in community of license be made minor modifications?[67]

46. ***A***: No, for the reasons described immediately above. We agree with the concept of making changes in community of license a one-step process (indeed, we suggested it before First Broadcasting), but only as a rule making and subject to the conditions for application of first local service preference described at paragraph 41 above. A one-step process, even as a rule making, substantially streamlines the FM frequency allocation system without risking unanticipated consequences in the execution one of the Commission's most crucial functions.

47. Even if one concedes that cut-off protection for changes in community of license would increase process efficiency as postulated by the *NPRM,* it is unreasonable to relegate 307(b) showings of public benefit to the same mechanistic, turn-the-crank analysis as engineering showings. *Tuck* showings have become nearly such an empty pro-forma exercise[68] and we've demonstrated the perverse results of that approach. We believe that changes of community of license (like any grant or withdrawal of broadcast facility rights to or from a community) should be open to counterproposals and public challenge. The Commission should continue to

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[65] *Clay AR,* ¶¶23-26.

[66] Most recent urban reallotments claim first local service, which we have shown is usually specious, as their primary public benefit. They also commonly claim increased population coverage as a benefit, but this would usually be ranked *less* beneficial than their former coverage if they had no recourse to first local service preference.

[67] *NPRM,* ¶24.

[68] Failed Tuck showings are not common, despite First Broadcasting's complaint of "regulatory uncertainty" (*NPRM,* ¶18).

carefully examine any purported showing of public benefit and its findings should be clearly set forth in a *Report and Order*.

48. The mere fact that a licensee's proposed change in community coverage is mutually exclusive with its current coverage is no reason to deny the public a thorough airing of the public interest questions raised by such a change. It must be noted that the §73.3573 Note 1 one-step process for changes in FM class and/or channel do not change a station's community of license and thus do not pose 307(b) issues of a magnitude similar to those posed by the streamlining contemplated by the *NPRM*.

49. It must also be noted that the "successful" 307(b) analysis that proponents claim for the AM frequency allocation process[69] refers only to process efficiency. As with the *NPRM*, these claims *assume* that "local service" perforce fulfills 307(b) mandates; we know of no attempt to quantify or verify the local transmission service provided pursuant to the AM allocation process[70]. Given the absence of such a showing for AM and the quantitative substance of our showings for FM, claims that the AM experience predicts future success for the FM process proposed by the *NPRM* are completely unfounded and must be ignored.

50. ***Q***: Should there be additional public notice requirements for changes in community of license?[71]

51. ***A***: Yes. Any licensee applying to withdraw service from any presently covered geographic area should be required to provide *on-air* announcements no later than their submittal of the relevant petition or application to the Commission. Such announcements should clearly describe the losing area, be broadcast on an evenly spaced, Commission-specified schedule, and

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[69] *Cumulus Comment*, ¶9.

[70] We invite correction by reply comment.

[71] *NPRM*, ¶28.

provide Commission-specified information as to how the public may comment upon the proposed changes. It is no more effective to inform radio listeners of a possible loss of radio service through newspaper advertisements than it would be to inform NASCAR fans of upcoming races by passing out handbills at art exhibits.

52. ***Q***: Should the factors governing withdrawal first local service from a community to provide another community first local service be more fully specified?[72]

53. ***A***: No. We have shown how the "objective" 307(b) *Tuck* community independence criteria are presently abused to claim first local service preference when none is provided. Until the Commission can demonstrate that its grants of first local service preference actually achieve the stated objective of that preference, any attempt to replace reasoned judgment and public discussion of 307(b) issues with more precisely defined "objective" criteria is likely to open another door for manipulation of the frequency allocation process to obtain results contrary to regulatory objectives and the public's benefit.

VI. Conclusion

54. We have responded to selected proposals of the *NPRM* with suggestions that seem likely to substantially improve the efficiency of the presently overburdened FM reallotment process *and* to increase the effectiveness with which the Commission can fulfill Congress's 307(b) mandate in the FM broadcast service.

55. The Commission regards "local service" as an essential element in meeting its 307(b) obligations, but it can neither measure nor demonstrate it provision by broadcasters. We have presented statistical evidence that the FM reallotment process usually fails to provide the local service upon with it is almost always justified. We contend these facts render the Commission's

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[72] *NPRM*, ¶40-46.

first local service frequency allocation preference arbitrary, capricious, and unlawful. We have suggested alternatives to processes proposed by the *NPRM* that would either eliminate first local service preference or restore its predictive value.

56. We have recounted the poorly-anticipated consequences of an earlier and less sweeping reallotment rule change, which led directly to the problems of which First Broadcasting and their allies have complained. Given this unhappy history, it is unwise to implement in a single stroke radical changes like those suggested by the *NPRM*. We advocate a more measured and incremental approach that places public interest concerns for fair allocation of broadcast resources ahead of process efficiency issues whose primary impact is upon the profits of private broadcasting interests.

57. Finally, we believe some of our suggestions can create market incentives for increased localism in the FM broadcast service. Localism may offer the brightest future for FM stations that must increasingly compete against satellite radio, Internet streaming, and other narrowcast but nationally homogenized audio media. Our suggestions will also preserve the few remaining holes in the urban spectrum that are likely to constitute the Commission's most fruitful opportunity to cultivate a long-lived and successful LPFM service.

Respectfully submitted,

William B. Clay

Verification & Certificate of Service

Verification required by 47 CFR 1.52 and 1.16:

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 14, 2005.

William B. Clay

These *Comments* contain material that may pertain to the merits of another proceeding, File No. BPH-20020116AAG, Facility ID: 52553. We therefore provide the service below.

I hereby certify that on the 28th day of September, 2005, I caused to be served by first-class mail, postage prepaid, a copy of the foregoing *Comments* upon Counsel for Susqehanna Radio Corp.:

Mark N. Lipp
J. Thomas Nolan
Vinson & Elkins L.L.P.
1455 Pennsylvania Ave., NW
Suite 600
Washington, DC 20004-1008

William B. Clay