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April 14, 2006

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APR 14 2006

Federal Communications Commission  
Office of Secretary

VIA HAND DELIVERY

Ms. Marlene H. Dortch, Secretary  
Office of the Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W., TW-A325  
Washington, D.C. 20554

Re: **Application for Review**  
Amendment of Section 73.202(b)  
Table of Allotments  
FM Broadcast Stations  
(Evergreen, Alabama and Shalimar, Florida)  
MB Docket No. 04-219  
RM-10986

Dear Ms. Dortch:

Transmitted herewith on behalf of Qantum of Ft. Walton Beach License Company, LLC, are an original and nine copies of its Application for Review in the above-referenced matter.

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

Sincerely,

  
John M. Pelkey

Enclosures  
JMP:yg

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Before the  
**Federal Communications Commission**  
Washington, D.C. 20054

In the Matter of )  
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Amendment of Section 73.202(b) ) MB Docket No. 04-219  
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To: Office of the Secretary

Attention: The Commission

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Federal Communications Commission  
Office of Secretary

**APPLICATION FOR REVIEW**

Qantum of Ft. Walton Beach  
License Company, LLC

John M. Pelkey  
Garvey Schubert Barer  
1000 Potomac Street, N.W.  
Fifth Floor, Flour Mill Building  
Washington, D.C. 20007

Its Counsel

Date: April 14, 2006

## Summary

Quantum of Ft. Walton Beach License Company, LLC ("Quantum"), by its attorneys, hereby applies to the Commission for review of the staff's *Memorandum Opinion and Order*, released February 24, 2006, in *Evergreen, Alabama, and Shalimar, Florida* (the "Shalimar" decision). In that proceeding, the Commission staff has permitted WPGG(FM), a station that has operated in rural Evergreen, Alabama, for nearly 25 years, to withdraw the second local transmission service from that community and, in the process, both withdraw service from nearly 165,000 people and create an underserved area encompassing at least 9,000 people who would receive fewer than five fulltime radio services. The staff's sole justification for permitting such a radical withdrawal of established service is that WPGG(FM)'s proposal would permit the station to provide first local service to Shalimar, Florida, a community of 718 people that is embedded deep within the Fort Walton Beach Urbanized Area and that is interdependent with that Urbanized Area's core community of Fort Walton Beach.

At the time that the Commission adopted its decisions in *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License* (the "*Community of License Modification Rule Making*") whereby it adopted procedures making it easier for licensees to change their communities of license, it incorporated into those decisions safeguards directed at ensuring that such licensees would not be able to shift service from underserved rural areas to well-served urban areas. In particular, it held that it would review any proposed relocation to determine whether there are sufficient public interest factors to offset the expectation of continued service at the incumbent community of license, regardless of whether the service being withdrawn is transmission service, reception service, or both. In addition, the Commission also held that it would review each proposal to

determine whether any claimed credit for providing first local transmission service was justified based upon the factors utilized by the Commission in *RKO General, Inc. (KFRC)* (the "*KFRC*" decision) and *Faye and Richard Tuck*.

Unfortunately, the Commission staff has been routinely ignoring the safeguards established by the Commission in the *Community of License Modification Rule Making*. Although the Commission staff should be analyzing each proposal for a change in community of license to determine whether the proponent is entitled under *Tuck* to any claimed credit for a Section 307(b) preference for providing first local transmission service, the practice that has developed is to do no more than pay lip service to *Tuck* and to grant the proposal regardless of the compliance of the proposal with the *Tuck* criteria. In point of fact, a review of all of the Commission's decisions issued over the last five years in which the *Tuck* standards were nominally applied by the staff in a change of community context reveals not a single reported instance wherein the Commission staff has found that the proponent has not met the *Tuck* criteria and thus is not entitled to credit for providing first local service.

The *Shalimar* decision with respect to which Quantum hereby seeks review is a paradigm case of the Commission staff's failure to apply the *Tuck* criteria. Comparing the staff's *Shalimar* decision with the decision of the full Commission in *KFRC*, the staff's *Shalimar* decision simply cannot be justified. Factors that the Commission found in *KFRC* to "strongly favor" the Commission's finding that the proponents were not entitled to credit for providing first local service yielded a completely opposite conclusion by the Commission staff in *Shalimar*. Especially now that the Commission is considering permitting licensees to change their communities of license through the application process, thus making it even easier for licensees to change their communities of license, it is vital that the Commission effectively police the

implementation of the *Community of License Modification Rule Making* so as to ensure that rural areas are not exposed to a continued degradation of service. Section 307(b) of the Communications Act requires no less. The *Shalimar* decision must be reviewed and reversed.

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Before the  
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In the Matter of )  
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FM Broadcast Stations )  
(Evergreen, Alabama and Shalimar, Florida) )

To: Office of the Secretary  
Attention: The Commission

**APPLICATION FOR REVIEW**

Quantum of Ft. Walton Beach License Company, LLC ("Quantum"), pursuant to Section 1.115 of the Commission's rules, hereby applies for review of the *Memorandum Opinion and Order* of the Assistant Chief, Audio Division, Media Bureau, in *Evergreen, Alabama, and Shalimar, Florida* (MB Docket No. 04-219) (adopted February 22, 2006; released February 24, 2006) (the "*Shalimar Decision*"). In that decision, the Commission staff denied a Petition for Reconsideration that had been filed by Quantum with respect to a *Report and Order* by which the Commission staff permitted WPGG(FM)<sup>1</sup> to withdraw the second local transmission service from Evergreen, Alabama, the county seat of Conecuh County, and relocate to Shalimar, Florida, a community of 718 people deeply embedded within the Fort Walton Beach Urbanized Area. As will be shown below, by permitting WPGG(FM) to withdraw the second local transmission service from Evergreen and, in the process, creating an underserved area encompassing more than 9,000 people, the *Shalimar Decision* leads to a result that is not only contrary to the public

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<sup>1</sup> The Petition for Rule Making that initiated this proceeding was originally filed by Gulf Coast Broadcasting Company, Inc. ("Gulf Coast"). Gulf Coast subsequently sold WPGG(FM) to Star Broadcasting, Inc. ("Star"), which, as result, became the successor in interest to Gulf Coast. To avoid confusion, the term "WPGG(FM)" will be used to describe the party proposing the abandonment of Evergreen and the reallocation of WPGG(FM)'s channel to Shalimar pursuant to the instant rule making.  
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interest, but subverts the scheme carefully established by the Commission at the time that it permitted licensees to propose changes in their communities of license without being subject to competing applications. As a result, the *Shalimar Decision* must be reversed.<sup>2</sup>

**I. The Question Presented for Review.**

May the Commission staff ignore the explicit directive of the full Commission, adopted to prevent broadcast stations from withdrawing service from rural communities and moving to urban areas, and permit a licensee to (i) withdraw the second local transmission service from a rural community, (ii) withdraw service from nearly 165,000 people, and (iii) in the process create underserved areas populated by more than 9,000 people receiving fewer than five fulltime radio services, in order to permit first local service to a community that is deeply embedded in an Urbanized Area and that fails to meet the criteria established by the Commission for the awarding of credit for first local service?

**II. The Procedural History: Evergreen, Alabama, and Shalimar, Florida, a Tale of Two Communities.**

WPGG(FM) has been a fixture in Evergreen, Alabama for nearly 25 years. The original construction permit for the station was granted in 1981 and the station completed construction in January 1983. As the result of Commission action in MM Docket No. 87-451, WPGG was able to upgrade to a Class C2 station operating with an ERP of 50 kW in 1989. In 1994, the Commission upgraded WPGG(FM) to Class C1 status by permitting the station to increase its ERP to 100 kW, thus permitting the station to serve the large rural area around Evergreen.

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<sup>2</sup> An application for review is the proper vehicle to obtain relief from action taken pursuant to delegated authority that is in conflict with statute, regulation, case precedent or established Commission policy. See 47 C.F.R. § 1.115(b)(2)(i).

Evergreen is the county seat of Conecuh, Alabama. According to the 2000 census, Evergreen has a population of 3,630 people. Conecuh County, with a population of only 14,089 people, is sparsely populated. Conecuh County is approximately 20 miles from the Florida-Alabama border, while Evergreen itself is approximately 50 miles from the Florida border. Evergreen has only one other radio station, WIJK, an AM station which operates with a power of 1 kW during the day and 177 watts at night.

On August 20, 2003, Gulf Coast, which was then the licensee of WPGG(FM), Evergreen, Alabama, filed a petition for rule making in which it sought the downgrading of allotted Channel 227C1 in Evergreen to Channel 227C2 and the reallocation of Channel 227C2 from Evergreen to Shalimar, Florida. Gulf Coast also proposed the modification of the WPGG(FM) license to specify operation on Channel 227C2 in Shalimar. Gulf Coast proposed this reallocation pursuant to Section 1.420(i) of the Commission's Rules, which permits the modification of a station's license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. *See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd. 4870 (1989), *recon. granted in part*, 5 FCC Rcd. 7094 (1990) (referred to herein as the "*Community of License Modification Rule Making*"). Seven days later, Gulf Coast entered into an agreement to sell WPGG(FM) and WIJK(AM) to Star, a broadcaster with its studios and offices in Fort Walton Beach. Section 1.8(a) of the Asset Purchase Agreement memorializing that transaction explicitly required Gulf Coast to file the instant rule making proposal to move WPGG(FM) to Shalimar. See BALH-20031105AAA.

The requisite *Notice of Proposed Rule Making* inviting the submission of comments was released by the Commission on June 10, 2004.<sup>3</sup> Qantum, pointing out that the proposal would

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<sup>3</sup> *Evergreen, Alabama, and Shalimar, Florida*, 19 FCC Rcd 10208 (Media Bureau 2004).  
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cause a withdrawal of service from more than 97,000 people, would create a new underserved area populated by more than 9,000 people and would fail to achieve a preferential arrangement of allotments inasmuch as it would not provide a first local service to Shalimar, but would in fact do no more than add an additional reception service to the already well-served Fort Walton Beach Urbanized Area, submitted Comments in opposition to the proposal. Despite Qantum's Comments, the Commission staff, ignoring without explanation Qantum's Technical Statement demonstrating the creation of the underserved area, issued a *Report and Order* on March 25, 2005, in which it granted the WPGG(FM) proposal. Three weeks later, i.e., on April 18, 2005, Star closed on the purchase of WPGG(FM). According to an Asset Exchange Agreement filed as part of the relevant assignment application, Star, on the very day that it closed on the purchase of WPGG(FM), entered into a contract to sell WPGG(FM) to Cumulus Broadcasting LLC and Cumulus Licensing LLC (jointly referred to as "Cumulus").<sup>4</sup> Cumulus is the largest broadcaster in Fort Walton Beach, based either on revenue share or audience share.

The WPGG(FM) proposal sought, and the Commission staff has now authorized, the establishment of reference coordinates for WPGG that are some 76 miles from the station's licensed coordinates. Whereas previously the station was located one county removed from Florida, the new facility, based upon the reference coordinates established in the rule making, is literally within feet of the Gulf of Mexico beach. An application filed by Star in response to the adoption of the *Report and Order* actually seeks approval to place the WPGG(FM) transmitter in Fort Walton Beach itself.<sup>5</sup>

The new community of license of Shalimar is less than a 1.5 mile drive from Fort Walton Beach and the two communities are separated by only six-tenths of a mile across Choctawhatchee Bay. Shalimar has only 718 residents, as compared to the 19,973 people in Fort

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<sup>4</sup> See BALH-20050503AAW.

<sup>5</sup> See BPH-20050513ACW.

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Walton Beach and the 152,741 people in the Fort Walton Beach Urbanized Area. It has only a part-time elected government and, in fact, its town manager lives outside of the town. It relies on other governments in the Fort Walton Beach Urbanized Areas for numerous municipal services. The high school attended by Shalimar students is located in Fort Walton Beach. Shalimar has no library. Although Shalimar has a police department, the Shalimar police force encourages residents to leave a voicemail message when no one is available at the police station or to call the Okaloosa County Sheriff's dispatcher. If the dispatcher is called, an Okaloosa County Sheriff, not a Shalimar police officer, responds to the call. Shalimar does not contain a location to register an automobile or to obtain a driver's license. There is no voter registration office in Shalimar. Water service is provided by the county. Natural gas service is provided by the Okaloosa County Gas District. Shalimar does not have its own telephone book and, as a result, listings for Shalimar are placed in the Fort Walton Beach telephone book. Shalimar has no hotels or motels and tourism is limited to people stopping at the local gas station. Residents seeking hospital services must travel to Fort Walton Beach or Niceville. Shalimar operates no public transportation beyond school buses and the 2000 U.S. Census indicates that only one person uses public transportation to travel to work.<sup>6</sup>

Quantum petitioned the Commission staff for reconsideration of the *Report and Order*. Quantum's Petition highlighted two key points. First, Quantum pointed out that the *Report and Order* had ignored without explanation Quantum's Technical Statement demonstrating the withdrawal of service from more than 97,000 people and the creation of underserved areas populated by more than 9,000 people. Second, Quantum explained that the Commission had failed to correctly apply the standards established by the Commission in *Faye and Richard Tuck*, 3 FCC Rcd. 5374 (1988) ("*Tuck*"), for purposes of determining when a proponent is to be credited

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<sup>6</sup> See Quantum Petition for Reconsideration at 4.  
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with providing first local transmission service. As Qantum explained, the uncontroverted evidence of record clearly demonstrated that the Channel 227C2 allotment to Shalimar had resulted in precisely the nightmare scenario envisioned by the Commission when it adopted the rule making permitting licensees to propose changes in their communities of license without being subjected to competing applications. In that rule making, the Commission emphasized that the *Tuck* criteria were designed to help ensure that licensees did not migrate to well-served larger metropolitan areas at the expense of listeners in rural areas. Nevertheless, the *Report and Order* had sanctioned precisely such a result. The conclusion was inescapable that either the *Report and Order* had misapplied the *Tuck* criteria or that the *Tuck* criteria were simply not doing their job inasmuch as they were permitting licensees to game the system to the detriment of rural listeners.

On February 24, 2006, the Commission staff issued the *Memorandum Opinion and Order* with respect to which Qantum hereby seeks review. In that *Memorandum Opinion and Order*, the Commission staff denied Qantum's Petition for Reconsideration. As it had done in the *Report and Order*, the staff stated in the *Memorandum Opinion and Order* that it had performed its own engineering study. Whereas the *Report and Order* had indicated that the Commission's engineering study revealed that 1,400 people would receive service from fewer than five aural services and thus be considered underserved, the *Memorandum Opinion and Order* stated that the Commission staff's engineering study concluded that 105 people would receive fewer than five aural services and thus be considered to be underserved. The *Memorandum Opinion and Order* provided no explanation for the discrepancy. With respect to the application of the *Tuck*

criteria, the *Memorandum Opinion and Order* merely repeated the statements made in the *Report and Order*. As a result, Quantum is hereby seeking review of the *Shalimar Decision*.<sup>7</sup>

### III. Prevention of Loss of Service to Rural and Underserved Areas.

#### A. The *Community of License Modification Rule Making* Established a Procedure to be Followed by the Commission Staff to Help Guard Against the Withdrawal of Service from Rural Areas by Stations Seeking to Move to Urban Areas.

Slightly more than 15 years ago, the Commission significantly revised its procedures whereby FM stations were permitted to change their communities of license. Whereas the prior procedure had subjected such proposals to competing applications, with the result that many licensees opted against changing their communities of license for fear of losing their underlying authorizations, the new procedure permitted licenses to file rule making proposals whereby they could obtain changes in their communities of license without subjecting their licenses to such competing applications. The Commission's adoption of this simplified procedure for changing communities of license potentially came at a cost, however. As the National Association of Broadcasters explained in its Petition for Reconsideration of the Commission's *Report and Order* in that proceeding, the revised procedures "could allow licensees to undermine the goals of Section 307(b) by abandoning rural, less populated, and underserved communities in order to seek enhanced financial opportunity in urban areas."<sup>8</sup> The NAB's concerns mirrored those of Commissioner Quello, who was so concerned about the possible abandonment of communities and the associated withdrawal of service from rural areas that he dissented to the Commission's decision.

In response to the NAB's Petition for Reconsideration, the Commission issued a *Memorandum Opinion and Order* in which it reconsidered its earlier decision and, in so doing,

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<sup>7</sup> A summary of the *Memorandum Opinion and Order* was published in the Federal Register on March 15, 2006, 71 Fed. Reg. 13283. This Application for Review is thus timely filed. See 47 C.F.R. §§ 1.4(b) and 1.115(d).

<sup>8</sup> 5 FCC Rcd at 7094.

made it clear that, in considering rule making petitions to change communities of license, the Commission would “consider whether a proposal would result in shifting of service from an underserved rural to a well-served urban area and the public interest consequences of any such change.”<sup>9</sup> In addition, the Commission explained that, in assessing the public interest implications of a proposed change in community of license, the Commission would look not only at the question of whether a licensee had proposed to move from a rural to an urban area, but would also assess whether the proposal resulted in a loss of service. As the Commission explained, “The public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallocating of a channel from one community to another, regardless of whether the service removed constitutes a transmission service, a reception service, or both. Removal of service is warranted only if there are sufficient public interest factors to offset the expectation of continued service.”<sup>10</sup>

In light of the changes effectuated by the Commission, Commissioner Quello issued a separate statement, rather than a dissent, in which he explained that, although he had dissented from the Commission’s earlier decision, he was “glad that, by this action [the adoption of the decision on reconsideration], the Commission is taking steps to ensure that changes in a community of license will truly serve our allotment priorities and will not deprive communities of local service.”<sup>11</sup>

In explicit recognition of the possible manipulation of the Commission’s Section 307(b) allotment priorities that could come about as a result of the Commission’s adoption of the new procedure for changing communities of license, the Commission explained that it had

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<sup>9</sup> 5 FCC Rcd at 7096.

<sup>10</sup> 5 FCC Rcd at 7097.

<sup>11</sup> 5 FCC Rcd at 7099.

“consistently given little or no weight to claimed first local service preferences if, given the facts and circumstances, the grant of a preference would appear to allow an artificial or purely technical manipulation of the Commission’s 307(b) related policies.”<sup>12</sup> The Commission particularly relied upon two prior decisions to be used to determine whether such an “artificial or purely technical manipulation” was occurring. Specifically, the Commission relied upon *RKO General (KFRC)*, 5 FCC Rcd 3222 (1990)(hereinafter referred to as "*KFRC*") and *Tuck*. In those two cases, the Commission had set forth specific guidelines for assessing whether a license should be given credit for providing first local service to a community when that community was located in proximity to a larger, well-served community.

**B. *KFRC*.**

In *KFRC*, the Commission was confronted with a situation in which an applicant had sought credit for providing first local service to Richmond, California, a community of 74,676 persons located 16 miles northeast of San Francisco across San Francisco Bay. The Commission acknowledged that Richmond was an incorporated city with a council-city manager form of government, that the Richmond government provided numerous municipal services, that the community of Richmond was part of the Richmond unified school district, and that the city budget for 1984-85 exceeded \$117,000,000. The Commission also acknowledged that Richmond was a significant transportation and manufacturing center containing a major seaport and that 8,940 people, out of the 28,739 people in Richmond's workforce, work in Richmond as compared with 2,966 who work in San Francisco. It was conceded that Richmond has a number of cultural and recreational facilities, houses of worship, medical facilities, and civic and other organizations. Richmond was also served by a daily newspaper headquartered in another community in West Contra Costa County and by a weekly shopper. Richmond telephone

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<sup>12</sup> 5 FCC Rcd at 7096.  
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numbers were also listed in a separate telephone directory and calls to San Francisco were toll calls. Finally, the Commission's review had found that the record contained insufficient evidence to support a finding that Richmond residents perceived Richmond as integrally related to the San Francisco-Oakland metropolitan area and that the record actually contained some evidence that the residents identified themselves as Richmond residents.<sup>13</sup>

Despite these indicia that Richmond was a community separate and apart from San Francisco and Oakland, the full Commission reversed the Review Board and found that the Richmond applicants were not entitled to a preference for providing first local service to Richmond. In making this determination, the Commission applied the standards that it had recently clarified in the *Tuck* decision. Specifically, the Commission applied three criteria that had been defined by *Tuck*. First, will the proposed facility provide service to the entire urbanized area (the "Coverage criterion")? Second, what is the size of the proposed community of license as compared to the core community and how far is the proposed community of license from the core community (the "Relative Size and Proximity criterion")? Finally, what is the level of interdependence between the smaller community and the core community (the "Interdependence criterion")?<sup>14</sup>

Applying the first two of the three *Tuck* criteria, the Commission found that those criteria "strongly" favored not giving a Section 307(b) preference to the Richmond applicants.<sup>15</sup> The Commission noted in particular that the proposals for Richmond facilities were "technically identical" with those applicants that had applied for San Francisco facilities and would serve not only the entire bay area, but "a much larger area as well."<sup>16</sup> With respect to the Relative Size and Proximity criterion, the Commission noted that Richmond was only 1/9 the size of San

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<sup>13</sup> 5 FCC Rcd at 3222-23.

<sup>14</sup> 5 FCC Rcd at 3223.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

Francisco and only 16 miles away.<sup>17</sup> Finally the Commission found it important that Richmond lies within the San Francisco-Oakland Urbanized Area.<sup>18</sup>

In making its determination as to whether Richmond was interdependent with San Francisco and Oakland, the Commission applied the eight part test established in *Tuck*.<sup>19</sup> Applying those factors, the Commission disagreed with the Review Board and found that the evidence indicated that Richmond was not independent of the core communities of San Francisco and Oakland. While agreeing with the Review Board that the fact that Richmond has a local government and elected officials and that Richmond has a full complement of municipal services indicated that Richmond was independent of San Francisco and Oakland, the Commission concluded that, with respect to the other six *Tuck* factors, the evidence was “at best, mixed.”<sup>20</sup> The Commission found it significant that Richmond did not have its own daily newspaper, that Richmond was served by the 25 commercial radio facilities licensed to San Francisco alone and by other stations in the Bay area. The fact that Richmond did not have its own telephone directory argued against its independence. While the Commission found that Richmond did have a number of commercial establishments, the Commission found it relevant that Richmond did not have a major public hospital or a local public transportation system. The Commission found that the record did not provide a basis for a conclusion as to whether community leaders and residents perceived Richmond as separate or an integral part of the

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> The Commission in *Tuck* set forth the following eight factors: (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 as police, fire protection, schools, and libraries.

<sup>20</sup> 5 FCC Rcd at 3224.

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metropolitan area. The Commission further found that Richmond was not independent of the core communities given the fact that only 35.1% of Richmond residents worked in Richmond. Finally, the Commission found further evidence of the lack of independence in that Richmond was not a separate advertising market. As a result of these determinations, the Commission concluded that the applicants seeking a Section 307(b) preference for providing first service to Richmond were not entitled to such a preference.

**C. *Tuck*.**

Both the Commission's *Community of License Modification Rule Making* and its *KFRC* decision rely heavily upon the protections established by the Commission in *Tuck*. Those protections were put in place specifically to help ensure that proponents seeking credit for first local transmission service are truly entitled to such a preference and are not attempting to game the system by proposing to provide first local transmission service to a community that is part of an urbanized area. Thus, in *Tuck*, the Commission defined the Census Bureau's urbanized areas as the relevant "communities" for Section 307(b) purposes.<sup>21</sup> In addition, the Commission explained that "the required showing of interdependence between the specified community and the central city will vary depending on the degree to which the second criterion -- relative size and proximity -- suggests that the community of license is simply an appendage of a large central city. When the specified community is relatively large and far away from the central city, a strong showing of interdependence would be necessary... On the other hand, less evidence that the communities are interdependent would be required when the community at issue is smaller and close to the central city."<sup>22</sup> Thus, the application of the eight factors specified in *Tuck* for determining whether two communities are interdependent will be flavored by the relative size and proximity of the proposed community to the core community. In sum, the Commission's

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<sup>21</sup> 3 FCC Red at 5379.

<sup>22</sup> 3 FCC Red at 5377.

*Community of License Modification Rule Making* established protections, as set forth in both *KFRC* and *Tuck*, to help ensure that its decision did not lead to the wholesale abandonment of rural communities in favor of better populated areas.

**D. The Commission Staff has Failed to Comply with the Standards Prescribed by the Commission.**

Unfortunately, over the last fifteen years, the Commission has done little more than pay lip service to observing the *KFRC* and *Tuck* requirements. A review of all reported Commission allocations cases citing *Tuck* over the last 5 years reveals not a single case in which the Commission staff has found that a proponent in a change of community rule making was not entitled to a credit for providing first local service. That fact in and of itself provides damning evidence that *Tuck* and the protections that it represents are being ignored – with the result that the Commission finds itself in the position of having failed to comply with its own requirements, as is mandated under the most basic tenets of administrative law. If the Commission is to reassert its control over the allocations process and to ensure that rural populations who have enjoyed service for many decades are not deprived of service simply to permit an already well-served area to receive yet an additional service, the Commission must reverse the staff decision below. Reversal is especially necessary given the Commission’s present consideration of a rule making that would further simplify the process whereby a licensee can change its community of license by permitting licensees to change their communities of license by filing a minor modification application rather than by being forced to go through the two-stage allocations and application process.<sup>23</sup> While no position is being taken with respect to that rule making in this application for review, the decision below highlights the need for the Commission to take steps to ensure that communities will not be deprived of service if that rule making is adopted.

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<sup>23</sup> See *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services (MB Docket No. 05-210), Notice of Proposed Rule Making* (Adopted: June 9, 2005; Released June 14, 2005).

If Evergreen, Alabama can be deprived of its second local transmission service and at least 9,000 people placed into the “underserved” category so that the Fort Walton Beach Urbanized Area, which already receives service from at least 17 stations, can receive yet an additional service, there is no rural community that can rest assured that it will continue to receive service from its local station. Indeed, the Commission has only recently reaffirmed the importance of second local service. Thus, in the recent decision of *Green Valley Broadcasters, Inc.*, the Commission granted an applicant a dispositive Section 307(b) preference because the applicant proposed second local service to the community of Sahuarita, Arizona, whereas the competing applicant was proposing to provide the 26<sup>th</sup> radio broadcast service to Las Vegas.<sup>24</sup> This recent reaffirmation of the importance of second local transmission service provides yet further evidence that the staff’s decision below must be reversed.

**IV. A Recurring Theme in the *Community of License Modification Rule Making* Is the Commission’s Insistence that it will not Permit a Withdrawal of Established Service In the Absence of Significant Public Interest Considerations Favoring Such a Withdrawal; No such Considerations Exist in the Case of the WPGG(FM) Proposal.**

In the present case, the Commission has chosen to gloss over the loss of service that would result from WPGG(FM)’s relocation from Evergreen to Shalimar. Quantum had demonstrated that 97,195 people would lose service as a result of WPGG(FM)’s relocation. The *Memorandum Opinion and Order* actually takes issue with Quantum for understating this number. The *Memorandum Opinion and Order* claims that 164,459 people, not 97,195, will lose service as a result of the staff’s action in granting the WPGG(FM) proposal. Despite the *Memorandum Opinion and Order*’s recognition that even more people will lose service than Quantum had originally calculated, it simply chooses to ignore this loss of service to a rural population because of the perceived advantages of providing first local service to Shalimar, a community of only 718

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<sup>24</sup> *Green Valley Broadcasters, Inc.*, (Adopted: December 9, 2005; Released: December 9, 2005).  
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people that, as will be explained below, is such an integral part of the Fort Walton Beach Urbanized Area that no credit for the provision of such a first local service can be awarded.

Even more significantly, the *Memorandum Opinion and Order*, by permitting the withdrawal of service from nearly 165, 000 people, permits the creation of an underserved population, i.e., a population that receives fewer than five fulltime services. Qantum had explained to the Commission that 9,062 people reside in these newly-created underserved areas. Curiously, the Commission's 2005 *Report and Order* in this proceeding stipulated that 1,400 people reside in these underserved areas based upon the Commission's own calculations, but the *Memorandum Opinion and Order* revises this figure so that, based upon the Commission's study, 105 persons would receive less than five services. Neither the Commission study that is referenced in the *Report and Order* nor the Commission's study that is referenced in the *Memorandum Opinion and Order* are provided by the Commission staff. No explanation is provided by the Commission staff as to why there is such a large discrepancy between the original determination made by the Commission in its *Report and Order* and the determination made in the *Memorandum Opinion and Order* as to the size of the population located within the loss areas. Instead, the Commission criticizes the Qantum engineering study for not providing information that the Commission staff deems to be pertinent to an analysis of the population within the loss area. Thus, the Commission staff says that, while the Commission based its calculation on 2000 U.S. centroid data, "Qantum has not provided supporting information regarding its populations that would be within the respective service contours."<sup>25</sup> Of course, as is the norm within the communications engineering community, Qantum's engineers also used 2000 U.S. centroid data. Thus, this alleged defect in Qantum's study in no way explains the widely different conclusions reached by Qantum's engineers and the Commission's engineers. As

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<sup>25</sup> *Memorandum Opinion and Order* at para. 4.  
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a fallback position, the Commission staff notes that, while Quantum references additional stations that serve portions of the existing WPGG(FM) service area, Quantum did not identify those stations or the areas they served. The Commission thus claims that it cannot “fully assess the accuracy of the Quantum engineering exhibit.”<sup>26</sup> Quantum’s engineering exhibit did explain, however, that the “additional stations” that were not included within the Quantum study were purposefully not included to minimize clutter and because those stations did not have contours that reached the underserved area.<sup>27</sup> In point of fact, Quantum's study considered ALL stations within 150 kilometers of WPGG(FM). The contours of those stations were then calculated using V-Soft Probe software in the case of FM stations and V-Soft AMPro in the case of AM stations. Obviously, with a starting point of all stations within 150 kilometers, many stations will not make the cut and it does not make any sense to include in a study stations that do not have an effect on the calculation of the coverage of the underserved area. In any event, the failure to specify all stations within 150 kilometers is a very minor defect when compared with the Commission staff's failure to identify ANY of the stations used by it in performing its study or identifying ANY of the assumptions made by it in making its calculations. Nor does any alleged defect in Quantum's study serve to explain the discrepancies in the Commission's own studies whereby it reaches a conclusion in one study that 1,400 people will drop into the ranks of the underserved but reaches a conclusion in a second study that 105 people will no longer receive five services.

To avoid any disputes on the accuracy of Quantum's study, however, Quantum has commissioned an updated engineering study by Doug Vernier Telecommunications Consultants, creators of the V-Soft software used to calculate the contours in Quantum's original study, software that is now used throughout the communications consulting industry. This updated

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<sup>26</sup> *Id.*

<sup>27</sup> Quantum Comments, Technical Statement at n.5.  
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study is based upon facilities changes that have been made since the original Quantum study was prepared in July 2004. The V-Soft study, which is attached hereto, concludes that the loss areas created by the WPGG(FM) proposal encompass 13,600 people, not the 105 people calculated in the Commission's second secret study. Moreover, according to the V-Soft study, there are 510 people who will receive a total of only 3 services after the proposed move. As a result, it is clear beyond peradventure that there will a significant withdrawal of service leading to a significant underserved population if this rulemaking is not reversed.<sup>28</sup> Such a withdrawal of service is *prima facie* evidence that the WPGG(FM) proposal is contrary to the public interest. See *West Michigan Telecasters, Inc.*, 22 FCC 2d 943 (1970), *recon. denied*, 26 FCC 2d 668 (1970), *aff'd*, *West Michigan Telecasters, Inc.*, 460 F. 2d 883 (D.C. Cir. 1972); *Triangle Publications, Inc.*, 37 FCC 307, 313 (1964).

**V. Applying the Standards Established by the Commission in the *Community of License Modification Rule Making*, the WPGG(FM) Proposal should have been Denied.**

Applying the standards established by the Commission in the *Community of License Modification Rule Making*, there is no doubt but that WPGG(FM)'s proposal to abandon Evergreen, Alabama, in favor of Shalimar, Florida, should have been denied. First of all, the proposal results in an actual withdrawal of service from 97,195 people and a theoretical withdrawal of service, as the Commission staff has itself admitted, from 164,459 people.<sup>29</sup>

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<sup>28</sup> Even though Quantum's engineering study was originally submitted as part of its Comments on August 2, 2004, the Commission staff did not provide its criticisms of that engineering study until the release of the *Memorandum Opinion and Order* on February 24, 2006, thus preventing Quantum from addressing those criticisms in its Petition for Reconsideration. Quantum is submitting this updated engineering study at this time in order to refute the Commission staff's criticisms of Quantum's original engineering study, and requests leave of the Commission to provide the updated engineering information at this time.

<sup>29</sup> The Commission's calculation of the number of people who will lose service is based on theoretical, maximum facilities for WPGG(FM) at Evergreen. WPGG(FM) does not actually use maximum facilities, however, and, as a result, Quantum calculated the actual loss of service based upon the station's licensed facilities. While the question of

Moreover, of the 97,195 people who currently receive actual service, at least 9,000 people (13,600 using current numbers) would receive fewer than 5 full-time services (and 510 people would receive only three stations) if WPGG(FM) were to be moved to Shalimar. In addition, the proposed rule making simply does not comport with the *Community of License Modification Rule Making* because it fails to do anything other than pay lip service to *KFRC* and *Tuck*. It treats Shalimar, a community that is less than 1/25 the size of Fort Walton Beach and that is separated from Fort Walton Beach by only one half mile of water as if were more independent of Fort Walton Beach than Richmond is of San Francisco -- with the result that it permits WPGG to place its transmitter site in Fort Walton Beach proper at a site from which the station places a contour over the entirety of the Fort Walton Beach Urbanized Area. Such a conclusion turns *Tuck* on its head.

**A. The Proposed Facility would cover the Entire Urbanized Area**

The *Memorandum Opinion and Order's* only response to Qantum's demonstration that the proposed WPGG(FM) facilities in Fort Walton Beach would cover the entire urbanized area is the statement "As a Class C2 facility, Station WPGG will invariably serve a large area and a significant portion of the Fort Walton Beach Urbanized Area. Because Station WPGG is a Class C2 facility, this coverage does not support a conclusion that Shalimar is not entitled to consideration as a first local service."<sup>30</sup> No citation to any full Commission decision is provided for this proposition. In point of fact, this statement is directly at odds with the *Community of License Modification Rule Making*. The Commission made it very clear in both *KRFC* and *Tuck*, and thus by extension in the *Community of License Modification Rule Making*, that the first factor to be reviewed in determining whether a proposed facility actually seeks to serve the

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which figure is more appropriate might be of academic interest, the point remains the same regardless of which figure is used: WPGG(FM) will be withdrawing service from a huge number of people.

<sup>30</sup> *Memorandum Opinion and Order* at para. 6.

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neighboring core community is the coverage that that facility would achieve. It is a truism that, as a Class C2 station, WPGG(FM) would serve a large area. It is equally true, however, that WPGG(FM) presently is a Class C1 station, which is a more powerful facility, and with that facility does not serve Fort Walton Beach. It is only because WPGG(FM) proposes to move to Fort Walton Beach that it is able to achieve coverage over the Fort Walton Beach Urbanized Area. Thus, for the Commission staff to claim that the class of the proposed WPGG(FM) facility is a reason to ignore the Commission's holding in *KFRC* and *Tuck* is an exercise in bootstrapping. Any licensee seeking to change its community of license would actually be encouraged by the *Memorandum Opinion and Order's* reasoning to specify the highest-powered facilities that it could as part of its relocation to a community from which it seeks to serve the neighboring urbanized area. The staff's sanctioning of the move by WPGG(FM) based, in part, upon the class of service to be provided by WPGG(FM) thus actually runs directly contrary to the Commission's stated intent in the *Community of License Modification Rule Making* of ensuring that rural areas continue to receive service.

#### **B. Relative Size and Proximity.**

The *Memorandum Opinion and Order* acknowledges that Shalimar's population of 718 persons is less than 4% of Fort Walton Beach's population of 19,973 people. The *Memorandum Opinion and Order* nevertheless seeks to justify its determination that this huge disparity is not germane by claiming that the staff has previously given a proponent credit for first local service when the community that it proposed to serve was 1/100<sup>th</sup> the size of the core community. There are two things wrong with this argument. First, *Ada, Newcastle and Watonga, Oklahoma*,<sup>31</sup> which is the case cited by the *Memorandum Opinion and Order* for this proposition, presented a situation in which the community for which first local service credit was

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<sup>31</sup> 11 FCC Rcd 16896 (MMB 1996).  
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