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May 16, 2006

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MAY 16 2006

Our File No. 20939-0100-60

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: **Reply to Opposition to 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 Reply to Opposition to 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

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MAY 16 2006

Federal Communications Commission  
Office of Secretary

In the Matter of )  
)  
Amendment of Section 73.202(b) ) MB Docket No. 04-219  
Table of Allotments ) RM-10986  
FM Broadcast Stations )  
(Evergreen, Alabama and Shalimar, Florida) )

To: Office of the Secretary  
Attention: The Commission

**Reply to Opposition to Application for Review**

Qantum of Ft. Walton Beach License Company, LLC ("Qantum"), through counsel, hereby replies to the Opposition to Application for Review filed by Star Broadcasting, Inc. ("Star"), with respect to an Application for Review filed by Qantum in the above-referenced proceeding.

In its Application for Review, Qantum had demonstrated that the Commission staff's *Memorandum Opinion and Order (MO&O)* in the above-referenced proceeding whereby the staff has permitted Star to abandon Evergreen, Alabama, so as to be able to provide service to the Fort Walton Beach Urbanized Area ignored the careful compromise established by the Commission in the rule making permitting stations to change their communities of license without subjecting themselves to competing applications.<sup>1</sup> That compromise required that the Commission staff follow procedures to help ensure that licensees would not be able to withdraw service from underserved areas in order to seek to serve better-heeled urban areas. The

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<sup>1</sup> 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*").

Commission thus referenced two prior decisions, *KFRC*<sup>2</sup> and *Tuck*,<sup>3</sup> to be used by the Commission staff to help avoid situations in which a rule making proponent engages in an “artificial or purely technical manipulation” of the Commission’s Section 307(b) policy favoring the provision of first local service to a community by specifying a community to which it would nominally be providing first local service when the proponent’s real intent is to provide service to the larger urbanized area of which that community is a small part. As Qantum explained in its Application for Review, the *MO&O* failed to heed the holdings of either *KFRC* or *Tuck*, a circumstance that unfortunately has become so commonplace that the Commission must review this proceeding if the careful compromise achieved by the Commission in the *Community of License Modification Rule Making* is to have any viability.<sup>4</sup>

In its Opposition (page 8), Star argues that Qantum’s reliance upon *KFRC* is somehow inappropriate because that case involved competing applications for a new station, rather than a proposal to change a station’s community of license. In so arguing, however, Star ignores the fact that it was the Commission itself that determined, in the *Community of License Modification Rule Making*, that the Commission staff was to look to *KFRC* for guidance as to whether a licensee is truly proposing to provide service to a community in need of such service, rather than to the urbanized area of which that community is a part.

Once *KFRC* is applied to the facts of the instant case, moreover, it becomes clear that the Commission staff should not have awarded credit to Star for proposing first local service to

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<sup>2</sup> *RKO General (KFRC)*, 5 FCC Rcd 3222 (1990)(referred to herein as “*KFRC*”).

<sup>3</sup> *Faye and Richard Tuck*, 3 FCC Rcd. 5374 (1988) (referred to herein as “*Tuck*”).

<sup>4</sup> Star claims that the Qantum Application for Review is procedurally defective because it did not reference Section 1.115(b)(2) to specify the factors which warrant Commission consideration of the staff action below. Star’s claim is factually incorrect, as even a cursory reading of footnote 2 of Qantum’s Application for Review reveals.

Star also criticizes Qantum’s provision of an updated engineering showing. As Qantum explained in its Application for Review (n. 28), the Commission staff withheld any criticism of Qantum’s original engineering showing until the *MO&O* was issued in response to Qantum’s Petition for Reconsideration – thus placing Qantum in the position where it could not have earlier responded to those criticisms. In any event, the updated engineering study provided by Qantum merely confirms the conclusions reached in Qantum’s original engineering study, namely that at least 9,000 people will become underserved as a result of the staff’s action.

Shalimar. In *KFRC*, the Commission found that the parties seeking credit for providing first local service to Richmond, California, were not entitled to such credit given Richmond's interdependence with San Francisco. The same interdependence exists between Shalimar and Fort Walton Beach. As was true in *KFRC*, the Shalimar proposal would provide service to the entire urbanized area. As was also true in *KFRC*, the proposed new community of license is too small and too close to the core community to be treated as anything other than interdependent with that core community. Richmond is 1/9 the size of San Francisco and 16 miles away from San Francisco. Shalimar is less than 1/25 the size of Fort Walton Beach and is separated from Fort Walton Beach by only ½ mile of water – meaning that, if anything, Shalimar is even smaller in comparison to Fort Walton Beach than Richmond is to San Francisco and Shalimar is closer to Fort Walton Beach than Richmond is to San Francisco. Thus, under both the "coverage criterion" and the "relative size and proximity criterion" established in *KFRC*, the Commission staff should have found that Shalimar was not entitled to credit for first local service.

Similarly, if the Commission staff had correctly applied *KFRC* and *Tuck*, it would inevitably have reached the conclusion that Shalimar is interdependent with Fort Walton Beach. The Commission staff itself admitted that, with respect to three of the eight *Tuck* factors, Shalimar clearly could not be found to be independent of Fort Walton Beach.<sup>5</sup> As Qantum demonstrated, those factors with respect to which the Commission staff found in the proponent's favor were misapplied. Thus, with respect to the question as to whether Shalimar residents work in the larger metropolitan area, rather than in Shalimar, Qantum demonstrated that the very data upon which the Commission staff relied conclusively demonstrated that Shalimar residents do not work in Shalimar. According to the Commission staff, the mean commuting time for

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<sup>5</sup> See Qantum Application for Review at 20 – 21. Counsel for Qantum has noted that the copy of the Qantum Application for Review that the Commission has posted on ECFS does not include page 21. For the benefit of those working from the ECFS copy of the Application for Review, a copy of Qantum's Application for Review, as received by the Commission's Secretary's office, is attached hereto.

Shalimar workers is 16.3 minutes. Given the fact that Shalimar itself is only approximately 1 mile long, it would take only two minutes for a Shalimar resident to drive the entire length of Shalimar even if he or she were only driving at 30 miles per hour. Confronted with this fact, Star asserts that, because the "average" commute time for Shalimar residents is 16.3 minutes "many workers are traveling less than that time."<sup>6</sup> In fact, however, because it takes only two minutes to traverse the entire length of Shalimar, a mean commute time of 16.3 minutes necessarily means that at least half of the Shalimar residents work well outside of Shalimar and, in point of fact, a mean commute time of 16.3 minutes could well mean that *no* Shalimar residents work in Shalimar.

Similarly, Qantum demonstrated that, just as Richmond, California, could not be given credit for being independent of San Francisco inasmuch as Richmond did not have a major public hospital and did not have a local public transportation system, so too Shalimar cannot be given credited as being independent of Fort Walton Beach inasmuch as Shalimar has neither a major public hospital nor a local public transportation system. If the Commission staff had correctly applied *KFRC* and *Tuck*, Shalimar would have received no credit whatsoever for compliance with the sixth *Tuck* interdependence factor, which means that a majority of the *Tuck* factors strongly argue against treating Shalimar as an independent community.

In addition to failing to correctly apply *KFRC* and *Tuck*, the *MO&O* also glosses over the fact that permitting WPGG to change its community of license from Evergreen, Alabama, to Shalimar, Florida, would result in an actual withdrawal of service from 97,195 people and a theoretical withdrawal of service, as the Commission staff itself admitted, from 164,459 people. At least 9,000 people would receive fewer than 5 fulltime services and 510 people would receive only 3 stations. Thus, the very situation that the Commission sought to avoid at the time that it

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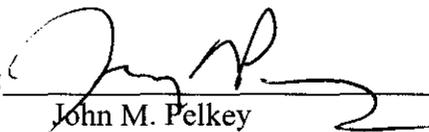
<sup>6</sup> Star Opposition at 10. The *MO&O* refers to a mean time of 16.3 minutes, not an average time.

adopted the *Community of License Modification Rule Making*, namely the withdrawal of service from an underserved area so that an already well-served area might receive yet additional service, will come to pass if the *MO&O* is not reversed.<sup>7</sup>

In summary, as Qantum clearly demonstrated in its Application for Review, review of this case by the full Commission is necessary if the careful scheme established by the Commission in permitting licensees to change their communities of license is not to have the untoward result of depriving thousands of residents of rural Alabama of service. Application of the *KFRC* and *Tuck* precedent conclusively reveals that Shalimar is not independent of Fort Walton Beach and Star's proposal to relocate WPGG from Evergreen to Shalimar will not provide first local service to Shalimar. Instead, it will do no more than provide already well-served Fort Walton Beach with but yet another broadcast service. As a result, Qantum respectfully requests that the Commission review and reverse the decision below.

Respectfully submitted,

Qantum of Ft. Walton Beach License Company, LLC

By:   
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(202) 965-7880

Date: May 16, 2006

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<sup>7</sup> Confronted with this deprivation of service, Star cites *ADA, Newcastle and Watonga, Oklahoma*, 11 FCC Rcd 16896 (MMB 1996), for the proposition that such a withdrawal of service is permissible. That case, however, dealt with a situation in which 99 percent of the populace within the loss area would continue to receive five fulltime services, whereas, in the present case, 10% of the population that would lose actual service will no longer receive service from at least five fulltime stations. *ADA, Newcastle and Watonga, Oklahoma* thus actually undercuts Star's claim that the number of fulltime services that will be received in the loss area is irrelevant.

# **Attachment A**



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April 14, 2006

**STAMP & RETURN**

Our File No. 20939-0100-60

**VIA HAND DELIVERY**

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

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Federal Communications Commission  
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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

DC\_DOCS:651207.1

Before the  
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Washington, D.C. 20054

In the Matter of )  
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Amendment of Section 73.202(b) ) MB Docket No. 04-219  
Table of Allotments ) RM-10986  
FM Broadcast Stations )  
(Evergreen, Alabama and Shalimar, Florida) )

To: Office of the Secretary

Attention: The Commission

**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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Washington, D.C. 20054

In the Matter of )  
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Amendment of Section 73.202(b) ) MB Docket No. 04-219  
Table of Allotments ) RM-10986  
FM Broadcast Stations )  
(Evergreen, Alabama and Shalimar, Florida) )

To: Office of the Secretary  
Attention: The Commission

**APPLICATION FOR REVIEW**

Qantum of Ft. Walton Beach License Company, LLC ("Qantum"), 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 Qantum 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.

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 Quantum's Comments, the Commission staff, ignoring without explanation Quantum'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.

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>

Qantum petitioned the Commission staff for reconsideration of the *Report and Order*. Qantum's Petition highlighted two key points. First, Qantum pointed out that the *Report and Order* had ignored without explanation Qantum'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, Qantum 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 Qantum Petition for Reconsideration at 4.  
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with providing first local transmission service. As Quantum 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 Quantum hereby seeks review. In that *Memorandum Opinion and Order*, the Commission staff denied Quantum'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, Qantum 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.

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 Rcd at 5379.

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